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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 415.

BENJAMIN HAWKER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF GENERAL SESSIONS OF THE PEACE FOR THE CITY AND COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED JULY 14, 1897.

(16,628.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 27, 1897.

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BLEED THROUGH POOR COPY

1 The return of the judges of the court of general sessions of the peace held in and for the city and county of New York.—A transcript of the indictment and judgment-roll of the court, together with all things touching or in anywise concerning the same.

We certify under the seal of our said court to the justices of the supreme court mentioned in the annexed writ filed in the clerk's office of this court on the first day of June, 1897.

By the court:

{ Seal of New York Courts of Oyer & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL, *Clerk.*

2 UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 26th day of June, one thousand eight hundred and ninety-seven, pursuant to a writ of error filed in the clerk's office of the court of general sessions of the peace in and for the city and county of New York, wherein Benjamin Hawker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles Andrews, chief justice of the court of appeals of the State of New York, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

(Signed) CHAS. ANDREWS,
Chief Justice of the Court of Appeals of the State of New York.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of general sessions of the peace in and for the city and county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of general sessions of the peace in and for the city and county of New York, before you or some of you, being the court of law of the said State in which a judgment was had in the said city between The People of the State of New York and Benjamin Hawker, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Benjamin Hawker, as by his com-

plaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the
4 26th day of June next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the United States Circuit Court for the Southern District of New York.

Allowed by—
CHAS. ANDREWS,
Chief Justice of the Court of Appeals of the State of New York.

5 Court of Appeals of the State of New York.

Ex Parte BENJAMIN HAWKER, Petitioner.

Petition for writ of error requiring the court of general sessions of the peace in and for the city and county of New York, State of New York, to certify to the Supreme Court of the United States for its review and determination the case of The People of the State of New York against Benjamin Hawker.

To the honorable court of appeals of the State of New York:

The petition of Benjamin Hawker respectfully shows to this honorable court as follows:

I. That your petitioner is a citizen of the United States and of the State of New York, and is a physician by profession, residing and doing business in the city of New York.

II. That heretofore an act was passed by the legislature of the State of New York, and is now in force, entitled "The public health law," and known as Laws of 1893, chap. 661, as amended by Laws of 1895, chap. 398, and which provided, among other things, as follows:

SECTION 153. Any person who, * * * after conviction of a felony, shall attempt to practice medicine or shall so practice * * * shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars or imprisonment for six months for the first offence and on conviction of any subsequent offence, by a fine of not more than five hundred dollars or imprisonment for not less than one year, or by both fine and imprisonment.

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6 III. That your petitioner was indicted by the grand jury of the city and county of New York on or about the 30th day of April, 1896, being charged with having violated the aforesaid statute in having practiced medicine after conviction of a felony. Petitioner demurred to said indictment on the ground that the facts stated therein do not constitute a crime, in that the statute alleged to have been violated is prospective in its application, or else if it is not prospective in the application it is null and void, as being in violation of art. I, sec. 10, of the Constitution of the United States, and of the fifth and fourteenth (sec. I) amendments to said Constitution, and also of art. I, secs. I and VI, of the constitution of the State of New York. Said demurrer was disallowed by Fitzgerald, J., on the 23d day of July, 1896. On July 27th, 1896, petitioner pleaded not guilty, and on September 17th, 1896, he was tried before the Honorable James Fitzgerald and a jury and convicted. On the same day judgment was pronounced upon petitioner, and Judge Fitzgerald granted a certificate of reasonable doubt and admitted petitioner to bail pending this appeal. On the trial of petitioner no witnesses were examined. Petitioner admitted to be true all the facts alleged in the indictment on which he was tried and moved for a dismissal of the indictment, and that the jury be advised to acquit on the grounds already set forth in the above-mentioned demurrer. An appeal from said judgment of conviction was taken to the appellate division of the supreme court of the State of New York for the first department on February 5th, 1897, wherein said conviction was reversed, the indictment dismissed, and your petitioner discharged; that thereupon an appeal was taken by the people to the court of appeals of the State of New

7 York from said judgment of the appellate division of the supreme court, and there a decision was rendered on or about March 16th, 1897, by a divided court, reversing the judgment of the appellate division of the supreme court affirming the conviction and remitting the proceedings to the court of general sessions of the peace in and for the city and county of New York, there to be proceeded upon according to law; that the grounds on which petitioner appealed from the judgment of conviction herein is that chap. 661 of the Laws of 1893, as amended by chap. 398 of the Laws of 1895, should be construed prospectively; that if construed retrospectively said statute is null and void, as being in conflict with the Constitution of the United States, in that it is in the nature of a bill of attainder, is an *ex post facto* law, deprives the defendant of liberty and property without due process of law, and compels the defendant to become a witness against himself. (See art. I, sec. 10, of the Constitution of the United States.)

IV. That a transcript of the record in this case from its commencement, duly certified under the seal of the clerk of the court of general sessions of the peace in and for the city and county of New York, is hereto annexed.

V. That your petitioner is advised by counsel and verily believes that this is a case provided for by sec. 709 of the Revised Statutes of the United States, in which the validity of a State statute is

drawn into question as being repugnant to the Constitution of the United States and to the rights guaranteed thereunder to citizens of the several States, and where a decision of the highest State court has been rendered in favor of said statute; that petitioner further says that it will be not only of great importance to him to
8 have the constitutional question involved in this case submitted for decision to the highest court in the land, but that a final decision of the matter there would settle the doubts now existing in the minds of the people of the State at large who are effected by the action of this law.

VI. Your petitioner therefore maintains that by the operation of the statute in question he is punished for an offence committed and atoned for many years before said statute was passed, and that he is deprived of liberty and property, as these terms are defined under the Constitution, in not being allowed to carry on a necessary and lawful occupation in a lawful manner.

Wherefore your petitioner prays that a writ of error may issue directed to the court of general sessions of the peace in and for the city and county of New York, to which court this case has been remitted by the New York court of appeals, requiring said court of general sessions to serve the said record to the Supreme Court of the United States, to the end that said case may be reviewed and determined by said Supreme Court, as provided by the Revised Statutes of the United States, and that said chap. 661 of the Laws of 1893, as amended by chap. 398 of the Laws of 1895, may be declared unconstitutional, and that the judgment of conviction heretofore rendered against your petitioner under said law may be reversed, and for such other relief as to said honorable court may seem just.

And your petitioner will ever pray, &c.

HUGH O. PENTECOST,
Attorney for Petitioner, 346 Broadway, New York City.

9 STATE OF NEW YORK, } ss.:
City and County of New York, }

Benjamin Hawker, being duly sworn, says that he is the petitioner in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true to his knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

BENJAMIN HAWKER.

Sworn to before me this 7th day of April, 1897.

SAMUEL FLEISCHMAN,
Notary Public, N. Y. Co.

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10 The Court of Appeals of the State of New York.

In the Matter of the Petition of BENJAMIN HAWKER, Appellant.

Assignment of Errors.

Afterwards, to wit, on the — day of April, in the year of our Lord one thousand eight hundred and ninety-seven, at the April term for one thousand eight hundred and ninety-seven of the court of appeals of the State of New York, at the capitol, in the city of Albany, comes the said Benjamin Hawker, by Hugh O. Pentecost, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the facts stated in the indictment against the said Benjamin Hawker do not constitute a crime, for the reason that the statute alleged to have been violated is prospective in its application, or, if said statute is not prospective in its application, it is null and void as being in violation of art. I, sec. X, of the Constitution of the United States and of the fifth amendment to the said Constitution.

II.

That the court of appeals of the State of New York erred in not sustaining the judgment of the appellate division of the supreme court of the said State in reversing the judgment of the court of general sessions of the peace in and for the city and county of New York, in dismissing the indictment herein and in discharging the said Benjamin Hawker.

Wherefore the said Benjamin Hawker prays that the order of the said court of appeals of the State of New York be reversed, and that the said court of general sessions of the peace in and for the
11 city and county of New York be ordered to enter an order directing the dismissal of the indictment herein and the discharge of the said Benjamin Hawker from custody.

HUGH O. PENTECOST,
Attorney for Petitioner, 346 Broadway, New York City.

12 [Endorsed:] U. S. Supreme Court. The People against Benjamin Hawker. Writ of error, citation, petition, etc. Hugh O. Pentecost, att'y for petitioner, 1 Madison Ave., New York city. Filed June 1st, 1897.

[Endorsed:] Due and timely service of the within citation & writ of error is hereby acknowledged. William M. K. Olcott, district attorney, by C. J. Campbell. New York, June 1st, 1897. District attorney's office, received Jun- 1, 1897.

13 I, John F. Carroll, clerk of the court of general sessions of the peace held in and for the city and county of New York, do hereby certify that the annexed is a copy of the remittitur in the case of The People of the State of New York against Benjamin

Hawker, now on file in the clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

Given under my hand and attested by the seal of the said court this tenth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

{ Seal of New York Courts of Oyer & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL.

3d vol. R. S., 5th ed., § 74, p. 687.

14 In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
BENJAMIN HAWKER, Respondent.

Case on appeal.

W. M. K. Olcott, district attorney, for appellants, Criminal Court building, New York city.

Hugh O. Pentecost, attorney for respondent, 346 Broadway, New York city.

15 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 16th day of March, in the year of our Lord one thousand eight hundred and ninety-seven, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur, March 16th, 1897.

16 THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
BENJAMIN HAWKER, Respondent.

Be it remembered that on the 27th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, The People of the State of New York, the appellants in this action, came here into court of appeals, by W. M. K. Olcott, their district attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court of the State of New York, and Benjamin Hawker, the respondent in said action, afterwards appeared in said court of appeals, by Hugh O. Pentecost, his attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

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17 Whereupon the said court of appeals, having heard this cause argued by Mr. John D. Lindsay, ass't district attorney, and Mr. Robert C. Taylor, of counsel for the appellants, and by Mr. Hugh O. Pentecost for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court in and for the first judicial department be, and the same hereby is, reversed, and that entered upon the conviction affirmed, and the proceedings remitted to the court of general sessions of the peace in and for the city and county of New York, there to be proceeded upon according to law.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the court of general sessions, there to be proceeded upon according to law.

18 Therefore it is considered that the said judgment be reversed, etc., as aforesaid.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the court of general sessions of the peace for the city and county of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said court of general sessions before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *March 16th*, 1897.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] GORHAM PARKS, *Clerk.*

19 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &C.,
against
BENJAMIN HAWKER.

SIRS: Please take notice that the defendant herein hereby appeals to the appellate division of the supreme court, first department, from the judgment rendered against him in this court on the 17th day of September, 1896, and from the decision by Fitzgerald, J., filed on the 23d day of July, 1896, disallowing the demurrer herein.

Dated New York, September 18th, 1896.

HUGH O. PENTECOST,
Attorney for Defendant, Appellant,
346 Broadway, New York City.

To John F. Carroll, Esq., clerk of the court of general sessions; John R. Fellows, Esq., district attorney of the city and county of New York; Robert C. Taylor, Esq., counsel for the Medical Society of New York.

20 Court of General Sessions of the Peace of the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
BENJAMIN HAWKER, Otherwise Called BENJAMIN W. HAWKER, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

The grand jury of the city and county of New York, by this indictment, accuse Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, of a misdemeanor, committed as follows:

Heretofore, to wit, on the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, at a term of the court of sessions held in and for the county of Kings, at the court-house in the city of Brooklyn, before the Honorable Henry A. Moore, county judge of Kings county, and the Honorable Gilbert Wickham, and the Honorable Peter Pigott, justices of the sessions of the county of Kings, the said Benjamin Hawker, otherwise as aforesaid, having been theretofore indicted under the name of Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, for the crime and felony of abortion, for having, at the city of Brooklyn, in the county of Kings, on the first day of September, in the year of our Lord one thousand eight hundred and seventy-seven, with force of arms, unlawfully, wickedly, feloniously and willfully made an assault upon one Amelia Hyde, she, the said
21 Amelia Hyde, being then and there pregnant with child, and for having then and there feloniously and willfully used and employed upon the body of her, the said Amelia Hyde, a certain instrument, which he then and there had and held, with intent then and there feloniously and willfully to produce the miscarriage of her, the said Amelia Hyde, and whereby he did then and there willfully and feloniously produce the miscarriage of her, the said Amelia Hyde, the same not being then and there necessary to preserve the life of her, the said Amelia Hyde, or that of such child, by means whereof the miscarriage of her, the said Amelia Hyde, was procured and the death of the said child produced; and having been duly arraigned in the said court upon the said indictment, and having pleaded not guilty thereto, and having been duly tried and convicted, was, on the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, at the said term of the said court of sessions held in and for the county of Kings, at the court-house in the city of Brooklyn, duly sentenced and adjudged by the said court of sessions to be imprisoned in the penitentiary of the county of Kings for the term of ten years.

And he, the said Benjamin Hawker, otherwise as aforesaid, having been so as aforesaid convicted of the said crime and felony of abortion, as aforesaid, afterwards to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and ninety-six, at the city of New York and county of New York aforesaid, unlawfully did practice medicine by then and there un-

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lawfully medically examining, treating and prescribing for one Dora Hoenig, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

JOHN R. FELLOWS,
District Attorney.

22 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, ETC.,
against
BENJAMIN HAWKER, Otherwise Called BENJAMIN W. HAWKER, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

The defendant, Benjamin Hawker, above named demurs to the indictments presented by the grand jury on the 30th day of April, 1896, charging him with violating chap. 661 of the Laws of 1893, as amended by chap. 398 of the Laws of 1895, in having practiced medicine after conviction of a felony, on the following ground:

That the facts stated in said indictment do not constitute a crime, in that the statute alleged to have been violated is prospective in its application, or if it is not prospective in its application it is null and void as being in violation of art. 1, sec. 10 of the Constitution of the United States, and of the 5th amendment to said Constitution, and also of art. 1, secs. 1 and 6 of the constitution of the State of New York.

Dated New York, April 7th, 1896.

HUGH O. PENTECOST,
Defendant's Attorney, 346 Broadway, N. Y. City.

23 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &C.,
against
BENJAMIN HAWKER, Otherwise Called Benjamin W. Hawker, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

On Indictment, Misdemeanor, Violation of Chap. 661, Laws of 1893, as Amended by Chap. 398, Laws of 1895. Filed April 30, 1896.

A demurrer having been heretofore filed to this indictment, and counsel having been heard thereon, it is considered by the court, and ordered and adjudged that the said demurrer be, and the same hereby is, disallowed, with leave to the defendant to plead over. (See opinion filed this day.)

Dated July 23, 1896.

24 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c., *against* BENJAMIN HAWKER. } Violation of Chapter 661 of Laws of 1893 as Amended by Chapter 398, Laws of 1895.

Appearances: Geo. Gordon Battle and Robert C. Taylor, Esqs., for the People, and Hugh O. Pentecost, Esq., for the defendant.

FITZGERALD, *J.*:

Proof of the facts alleged in this indictment would clearly establish a violation of the statute, and subject the defendant to the penalties therein provided.

The defendant contends that the act is unconstitutional.

There are some grave questions involved in the discussion of this point, but where the affirmative of the proposition of the unconstitutionality of a law is not conclusively established by binding precedent the orderly administration of public justice requires that a trial court should resolve the question in favor of the law.

Applying this rule to the pending issue, the demurrer interposed must be disallowed, with leave to defendant to plead over.

Dated July 23, 1896.

25 At a court of general sessions of the peace, holden in and for the city and county of New York, at the city hall of the said city, on Thursday, the 17th day of September, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable James Fitzgerald, judge of said court of the city of New York, justice of the sessions.

Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, is in due form of law arraigned at the bar upon an indictment for a misdemeanor, and having heard the indictment read and being asked whether he demanded a trial thereon, answers that he does require a trial, and says that he is not guilty thereof.

Whereupon the following jury is balloted and sworn to well and truly try and a true verdict give according to evidence, viz: Charles Hirsch, Peter J. Koelble, Thomas F. Gaynor, Charles Tisch, Joseph Stephens, John H. Irwin, Linden D. Stevens, Ernest Young, Jr., John Wild, Warren Marcus, Frank L. Latham, Murray H. Strong, who upon their oath aforesaid do say that the said defendant is guilty of the misdemeanor as by the indictment is alleged against him.

Counsel for defendant moves for a new trial and an arrest of judgment on various grounds.

After hearing counsel thereon the court denies the motions.

The defendant is arraigned at the bar.

The district attorney moves for judgment against the defendant.

It is thereupon demanded of the said defendant what he hath to say why judgment should not be pronounced against him accord-

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ing to law, who nothing further saith unless as before he hath said.

26 Whereupon it is ordered and adjudged by the court that the said Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, for the misdemeanor aforesaid, whereof he is convicted, pay a fine of two hundred and fifty dollars.

And it is further ordered that in default of the payment of said fine he stand committed to the custody of the warden of the city prison of the city of New York until the same be paid, not exceeding one day for each dollar of the fine imposed.

A true extract from the minutes.

JOHN F. CARROLL,
Clerk of Court.

27 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
BENJAMIN HAWKER, alias BENJAMIN W. HAWKER, alias BENJAMIN PERRY, alias BENJAMIN WEST.

Indicted for a misdemeanor.

Indictment filed 30th of April, 1896.

Tried before the Hon. James Fitzgerald, judge, and a jury, on the 17th day of September, 1896.

Appearances: George Gordon Battle, Esq., for the People; Hugh O. Pentecost, Esq., for the defendant.

(Jury impaneled.)

Mr. BATTLE: This defendant was indicted for a misdemeanor under chapter 398, section 153, of the Laws of 1895, known as a public health law. He is charged in this indictment with having practiced medicine on the 22d day of February, 1896, having been theretofore convicted of a felony, the felony consisting of the crime of abortion, for which he was convicted, in 1878, in the county of Kings.

To this indictment counsel for the defendant interposed a demurrer, upon the ground that the law was unconstitutional. The demurrer has been overruled by the court, and the case now comes up for trial. The facts will be conceded by defendant's counsel.

28 Mr. PENTECOST: The defendant concedes all the facts set forth in the indictment to be true.

I move the court to advise the jury to acquit, and that the indictment herein be dismissed, upon the ground that the facts set forth in said indictment do not constitute a crime, as hereinbefore set forth in the arguments heard before your honor in support of the demurrer heretofore interposed.

The COURT: The facts stated in the indictment. You concede the facts in this case as claimed by the district attorney, and you

make the further concession that they are to be considered by the court and jury as though they were facts testified to by witnesses on the stand?

Mr. PENTECOST: Yes.

The COURT: Motion denied.

Mr. PENTECOST: I except.

The Court's Charge.

GENTLEMEN OF THE JURY: It is charged in this indictment that the defendant violated the law. The facts alleged in the indictment, as constituting that violation of the law, are all conceded by the defense. The defendant interposed a legal defense, which was a matter for the court to pass upon, and the court has passed upon that adversely to him.

All questions of fact under our law must be passed upon by a jury. Therefore the facts in this case, even though they are conceded, must be submitted to you.

The charge in the indictment is that the defendant, after having been convicted of a felony, practiced medicine, and the defense concede that to be so, and say they are willing that you should so consider it in the same manner as if witnesses had been called and testified before you that they had visited the defendant's office, had been treated by him and paid him a fee, and then, subse-
29 quently, if it were shown that the defendant had been convicted of a felony, the crime is made out, as charged.

It is conceded that he has been heretofore convicted of a felony, as alleged.

All the facts charged are conceded, and if you believe them to be true, you will convict the defendant. If you entertain a reasonable doubt of his guilt, you will acquit him.

Your verdict will be either guilty or not guilty, as charged in the indictment.

The jury rendered a verdict of guilty.

The defendant moves the court for a new trial upon all the grounds set up by the exceptions taken at the trial, and on the further ground that the verdict was contrary to law. And the defendant further moves for an arrest of judgment on the ground that the facts stated in the indictment herein do not constitute a crime.

Motion denied. Defendant excepts.

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30 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c.,
against
BENJAMIN HAWKER, Otherwise Called BENJAMIN W. HAWKER, Otherwise Called Benjamin Perry, Otherwise Called Benjamin West.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, James Fitzgerald, judge of the court of general sessions of the peace in and for the city and county of New York, who presided at the trial of Benjamin Hawker, the above-named defendant, on an indictment charging the said Benjamin Hawker with a misdemeanor in violating chapter 661 of the Laws of 1893, as amended by chapter 398 of the Laws of 1895, namely, by having practiced medicine after conviction of a felony, and who was convicted of said crime by a jury on said trial, on the 17th day of September, 1896, do hereby certify that, in my opinion, there is reasonable doubt whether the said judgment should stand.

Dated at New York this 17th day of September, 1896.

JAMES FITZGERALD,
Judge of the Court of General Sessions.

31 New York Supreme Court, Appellate Division, First Department.

THE PEOPLE, ETC.,
against
BENJAMIN HAWKER.

It is hereby stipulated and agreed, that the foregoing record shall be taken and deemed to be the complete and correct copy of the case on appeal and bill of exceptions herein, and that the said record comprises all material testimony herein, and that the printed case may be filed as the original.

Dated New York, ——, 1896.

JOHN R. FELLOWS,
District Attorney, Attorney for the Respondents.

HUGH O. PENTECOST,
Attorney for the Appellant.

On the foregoing stipulation, it is ordered that the foregoing printed case be filed as the original.

Dated New York, ——, 1896.

JAMES FITZGERALD,
Judge of the Court of General Sessions.

32 I, John F. Carroll, clerk of the court of general sessions of the peace held in and for the city and county of New York, do hereby certify that the foregoing is a copy of the notice of appeal

and of the judgment-roll in the case of The People against Benjamin Hawker, otherwise called Benjamin W. Hawker, otherwise called Benjamin Perry, otherwise called Benjamin West, convicted by a jury of a misdemeanor, now on file in the clerk's office of said court of general sessions, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

Given under my hand and attested by the seal of the said
[L. S.] court this — day of November, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN F. CARROLL.

Secs. 485, 532 and 517, Code Criminal Pro.

33 At a term of the appellate division of the supreme court of the State of New York, in and for the first judicial department, held at the court-house of the said appellate division in the city of New York, on the 5th day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Hon. Charles H. Van Brunt, P. J.
Hon. Pardon C. Williams,
Hon. Edward Patterson,
Hon. Morgan J. O'Brien,
Hon. George L. Ingraham, } JJ.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,
against
BENJAMIN HAWKER, Appellant. } Order of Reversal.

The above-named appellant having been, at a court of general sessions held in and for the city and county of New York at the criminal court building in said city, on the seventeenth day of September, in the year of our Lord one thousand eight hundred and ninety-six, convicted of a misdemeanor, to wit, a violation of section 153 of the public health law, whereupon it was considered by the said court, and ordered and adjudged, that the said appellant, for the felony aforesaid whereof he was so convicted as aforesaid, pay a fine of two hundred and fifty dollars;

And the appellant aforesaid, having thereafter duly appealed from the said judgment to this court, and the said appeal having come on to be heard in due form of law, and the return herein being now before this court, and having been by this court duly in-
34 spected, upon which inspection it has and doth now appear to this court that the court below erred in overruling the demurrer to the indictment, and that certain errors of law were committed upon the trial of the above-named appellant, and this court upon such examination and inspection of the said return, and the facts herein there represented, having exercised its discretion, and having refused a new trial upon the facts herein, and having also refused a new trial upon the ground that the verdict was against the weight of the evidence:

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Now, therefore, after hearing Hugh O. Pentecost, Esquire, of counsel for the appellant, and Robert C. Taylor, Esquire, of counsel for the respondents, due deliberation being had thereon, it is—

Ordered and adjudged, that for the errors of law aforesaid, so found in said return, and not for errors of fact, nor as a matter of discretion, the said judgment, so appealed from as aforesaid, be and the same hereby is in all things reversed, and that the indictment against the appellant be dismissed and the appellant discharged; and it is further

Ordered, that the proceedings herein be and the same are hereby remitted to the said court of general sessions, there to be proceeded upon according to law.

Ent.

C. H. V. B., *P. J.*

Indorsed: Filed February 10, 1897. Alfred Wagstaff, clerk appellate division. A copy. Alfred Wagstaff, clerk appellate division.

35 New York Supreme Court, Appellate Division, First Department.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
BENJAMIN HAWKER, Respondent.

SIRS: Please take notice that the People of the State of New York hereby appeal to the court of appeals from the judgment rendered herein on the 5th day of February, 1897, reversing the judgment of the court of general sessions of the peace of the city and county of New York rendered against the respondent on the 17th day of September, 1896, on his conviction in said court of a violation of the public health law, dismissing the indictment against the respondent and discharging him from said judgment of conviction, and from each and every part of the said judgment of reversal.

Dated New York city, February 11, 1897.

W. M. K. OLCOTT,
District Attorney.

To Hugh O. Pentecost, Esq., attorney for the respondent, No. 346 Broadway, New York city; Henry D. Purroy, Esq., county clerk, etc., New York city; John F. Carroll, Esq., clerk of said court of general sessions, New York city.

36 Supreme Court, Appellate Division, First Department.

Present: Hon. Charles H. Van Brunt, P. J.
Hon. Pardon C. Williams,
Hon. Edward Patterson,
Hon. Morgan J. O'Brien,
Hon. George L. Ingraham. } JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
vs.
BENJAMIN HAWKER, Appellant.

Appeal from judgment of the court of general sessions, September 17, 1897, Hon. James Fitzgerald, presiding, convicting defendant of misdemeanor, and from judgment overruling a demurrer. Reversed.

Argued December 16, 1896. Decided February 5, 1897. Reported appellate division.

Mr. Hugh O. Pentecost, for appellant; Mr. Robert C. Taylor, for respondent.

PATTERSON, *J.:*

The appellant was indicted in the court of general sessions of the peace for a misdemeanor charged to have been committed by violating that provision of section 153 of the public health law (chapter 661, Laws 1893, as amended by chapter 398, Laws 1895), which enacts, among other things, that any person who after conviction of a felony shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor. It is alleged in the indictment that the appellant was convicted in March, 1878, of a felony and was sentenced to a term of imprisonment, notwithstanding which,
37 and contrary to the act of 1893, as amended in 1895, he did practice medicine in the city of New York on the 22d day of February, 1896. A demurrer was interposed to the indictment on the ground that the provision of the statute sought to be enforced against the prisoner is unconstitutional. The demurrer was overruled. On his arraignment for trial, the defendant admitted on the record that all the facts set forth in the indictment were true, whereupon he was found guilty and sentence was imposed, but its execution was suspended and a certificate of reasonable doubt was given, in order that the question of law involved might be passed upon by the appellate courts. That question is now brought up by appeal from the judgment and from the order overruling the demurrer, and, stated in its simplest form, it is, whether the legislation of 1893 and 1895, in so far as it relates to convictions had prior to that statute taking effect, is a lawful exercise of the police power of the State or is an *ex post facto* law, or one in the nature of a bill of attainder or a bill of pains and penalties, and thus included in the powers the exercise of which is forbidden to the several States of the Union by subdivision 1 of section 10 of the Constitution of the United States.

It is not, and in reason cannot be, denied that that function of

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government called the police power of the State extends to the regulation, control and supervision of all matters relating to the public health, or that legislation upon such subjects is entirely within the jurisdiction of the several States. As affecting public health, each State has the absolute right to make such appropriate and constitutional laws as it may deem proper relating to the conditions upon which any person will be allowed to practice medicine or surgery within its territorial limits. That power is not confined merely to dictating conditions or requiring qualifications applicable to the acquisition of an original right or permission to practice, but it includes also the authority to prescribe new conditions as the necessity for them may arise, upon which one practicing the healing art may continue in the pursuit of his profession. As is said in
38 Dent *vs.* West Virginia, 129 U. S., 114, the same reasons that control in imposing conditions upon compliance with which the physician is allowed to practice in the first instance may call for further conditions as a requirement of his continuance in practice. All legislation exclusively directed to the accomplishment of that object comes within the police power of the State. Therefore, in its operation upon those convicted of felony after its passage, the provision of the public health law now under consideration is constitutional and valid, for it declares in advance that whosoever shall thereafter be convicted of a felony shall not be allowed to continue in the practice of medicine, and the additional punishment for crime is announced before the crime is committed. But with respect to those who had acquired the right to practice and may have been convicted before the act of 1893, the question is presented in an entirely different aspect. As was said by Mr. Justice McLean in the alien passenger cases (7 How., U. S., 408), "the police power of the State cannot draw within its jurisdiction objects which lie beyond it."

"In guarding the safety, the health and morals of its citizens a State is restricted to appropriate and constitutional means." Assuming, for the purpose of the argument, that the legislature may require for the continuance in the practice of medicine that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such requirement must relate to a present status or condition of a person coming within the terms of the act. The law under which this appellant was indicted does not deal with his present moral character. It seizes upon a past offense, and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. It will be observed that this statute includes any and all felonies—not only those committed in connection with the profession of medicine and surgery, but any and every felony in the whole catalogue of crime, whether committed here or in another jurisdiction. Its design is to deprive convicted felons of the right of practicing at all. Clearly it
39 acts directly upon and enhances the punishment of the antecedently committed offense by depriving the person of his property and right and preventing his earning his livelihood in his

profession, only because of his past, and in this case expiated offense against the criminal law. This prisoner has committed no new crime, except that which the statute has created out of the old one. He had absolutely the right to practice medicine the day before that statute was passed. His former conviction entailed the punishment of imprisonment and disfranchisement as a voter, but it did not take away from his property in the right to earn his living on the expiration of his imprisonment by engaging in the profession of which he was and is a member. His civil rights were not extinguished but only suspended during his imprisonment (2 R. S., p. 701, sec. 19; Penal Code, sec. 710). That his right to so engage in that profession is in the nature of a property right cannot be disputed. It is not a mere revocable license. As is said in the Dent case (*supra*), in this country "all vocations are open to every one on like conditions. All may be pursued as a means of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate in them, *that is, the right to continue their prosecution,* is often of great value to the possessors *and cannot be arbitrarily taken from them any more than their real or personal property can be thus taken.*" That means that if it is taken away it must be for cause. It was held in that case that there is no arbitrary taking away of the right where its exercise is not permitted for failure to comply with conditions imposed by the State for the protection and welfare of the people, and hence a law requiring practitioners of medicine under certain circumstances to procure evidence of their fitness to continue in practice was a valid exercise of legislative power and a conviction for practicing without such evidence was sustained. The authority of the Dent case is invoked here as being conclusive upon the validity of the law under which this appellant was indicted, but the distinction between that case and this is broad and striking. No question arose there of the construction of a new crime out of an old one, nor the taking away by legislation of a right because of the previous commission of an offense. It was the mere regulation of the right.

All that the statute of West Virginia required related to physicians habitually practicing in that State furnishing themselves with evidence of their qualifications to continue in the pursuit of a calling, and making it a misdemeanor to practice without that evidence. The court was very careful to point out the difference between it and that other class of cases in which laws were "designed to deprive parties of their rights to continue in their profession for past acts." In the Dent case the statute applied to every person, without exception, practicing in the State of West Virginia and related directly to fixing a then present status as to the qualifications of every physician in the State. Conceding, but not deciding, that the legislature may require as a condition for continuing in the practice of medicine that every practitioner shall be possessed of and continue to have a good moral character, that requirement would refer to some present qualification to be ascertained by conditions existing at the time the enforcement of the requirement was sought. Con-

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viction of a felony certainly raises a presumption of bad character—but it is not an irrebuttable presumption that a man convicted of an infamous crime, "treason, felony or the *crimen falsi*," ten or twenty or fifty years ago is today absolutely an immoral person unfit to practice any profession. There is no such conclusive presumption. Even as to the competency of witnesses, the old rule of disqualification of convicts is completely done away with in the State of New York (Code Civ. Proc., sec. 832). The provision of the statute we are now considering does not take hold of an existing condition of moral character. That may be never so good and yet the new crime exists, arising exclusively out of a past transgression. It is said that the legislature has only made the former conviction evidence of a disqualification which it had the power to impose—but that is not so. It makes the prior conviction, which is but the establishment by adjudication that a crime
41 was committed, the very essence of the newly created crime.

The design of the act is, therefore, fully apparent. No matter how praiseworthy the motive may be, it is meant to deprive one class of persons otherwise lawfully engaged in the exercise of a right, of that right, because of past occurrences "many of which are in nowise associated with their professional pursuits," for this act strikes at the unfortunate man who in his youth may have violated the law, and without real evil intent have committed and been convicted of any felony and pardoned the very day of his conviction, as well as the hardened criminal, guilty of as foul an offense as that of which this appellant was convicted. The underlying purpose of the act may be to purge the medical profession of members unworthy of confidence, but the real effect is to accomplish that by inflicting an additional punishment through a newly created offense inseparably connected with the anterior crime, and thus bring about a result the Constitution forbids, no matter in what form the statute is drawn. The distinction between the two classes of cases runs through the leading authorities on the subject. It is plainly pointed out in the Garland case (4 Wallace, 333). In the opinion of the court in that case it is declared that "exclusion from any of the professions or any of the ordinary avocations of life *for past conduct* can be regarded in no other light than as punishment for such conduct," and it was held that laws of that character come within the constitutional inhibition. Not only is this defendant punished by exclusion from his profession, but he is to suffer fine and imprisonment also. That fine and imprisonment may be said to be punishment for violating the new law, but the exclusion from the profession under pains and penalties for continuing in its practice is only because of the previous crime, and hence additional punishment for that crime. The chief arguments to be urged in favor of the constitutionality of this law are very powerfully advanced by Mr. Justice Miller in the minority opinion in the Garland case, and they are to a great extent the same general considerations
42 relied upon by the people in the case at bar. And so in the Utah election cases (Murphy *vs.* Ramsey and four other cases, 114 U. S., 14) the question related to the validity of an act of the

Congress operating the disfranchisement of voters in the Territory of Utah who were bigamists or polygamists. The act was declared constitutional because it operated upon the present status of voters then having a plurality of wives. The disfranchisement was not because the person had committed bigamy or polygamy, but because he persisted in crime by continuing in the criminal or forbidden relation in violation of a statute. No additional punishment was added to a past crime. In the case at bar, as before remarked, the real substance of the present misdemeanor is created from the past offense.

Our conclusions, therefore, are: 1st. That the provision we have considered of the public health law *is constitutional* so far as it operates prospectively and upon persons convicted of felony after its passage. 2d. That it *is unconstitutional* in so far as it applies by its terms to persons so convicted before the law went into operation.

The judgment and order appealed from must be reversed, the indictment dismissed and the appellant discharged.

Van Brunt, P. J., Williams and O'Brien, JJ., concur.

43 Supreme Court, Appellate Division, First Department, January, 1897.

Charles H. Van Brunt, P. J.
Pardon C. Williams, }
Edward Patterson, } JJ.
Morgan J. O'Brien, }
George L. Ingraham, }

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, } No. 910.
vs.
BENJAMIN HAWKER, Appellant.

Appeal from judgment of the court of general sessions convicting defendant of misdemeanor, and from judgment overruling demurrer.

Mr. Hugh O. Pentecost, for the appellant; Mr. Robert C. Taylor, for the respondent.

INGRAHAM, *J.:*

I cannot agree with Mr. Justice Patterson. The question, as he states it, is whether the provision of section 153 of the public health law, chapter 661 of the Laws of 1893, in so far as it relates to convictions had prior to that statute taking effect, is a lawful exercise of the police power of the State, or is an *ex post facto* law, or one in the nature of a bill of attainder or a bill of pains and penalties, and thus included in the powers the exercise of which is forbidden to the several States of the Union by subdivision 1 of section 10 of the Constitution of the United States. It is not pointed out in the prevailing opinion whether the provision in question is an *ex post facto* law or one in the nature of a bill of attainder or a
44 bill of pains and penalties; but in the opinion the act is assumed to be valid unless it is in violation of this provision

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of the Federal Constitution. It is now too late to question the right of the State to make the regulations necessary for the preservation of the public health; and, although the exercise of that power must necessarily involve some restraint in the liberty of the individual, or in his right to pursue a particular avocation, dependent upon the condition of affairs at the time of the exercise of the power, still where the court can see that the methods adopted have a reasonable connection with the preservation of the public health, I do not understand that they are necessarily *ex post facto* because rights of the individual that existed prior to the passage of the law that creates the restriction are curtailed. I suppose that if an act was passed requiring that those having a contagious or infectious disease should be isolated so as to avoid communicating the disease, the fact that such disease existed prior to the time of the passage of the act would not make the fact *ex post facto*, and so unconstitutional, nor would such isolation or control over a person who has such a disease be a punishment for having the disease; and so as to the power of the State to regulate the practice of those professions that have to do with the public health, and to determine who shall practice such professions within the State, and what qualifications they shall possess, has been recognized as being within the power of the State by a long series of legislative acts and by the decisions of the highest courts of this State and of the United States. The question was directly presented to the Supreme Court of the United States in the case of Dent *vs.* West Virginia (129 U. S., 114). It was there expressly held that an act of the legislature of the State of West Virginia prohibiting a person from practicing medicine unless such person had a degree of a recognized medical college, had passed an examination, or had practiced medicine in the State for at least ten years prior to the passage of the act, was a valid exercise of this power by the State; and the conviction of a person who had practiced but five years prior to the passage of the act was upheld. The legislature has provided a test which would regulate the practice of all those who in the future should practice medicine within the State, and prohibiting those who had not the required qualifications from practicing. That prohibition applied to one who had practiced for five years prior to the passage of the act and who was practicing at the time of its passage. The number of years in practice was the test there prescribed. It was a purely arbitrary one fixed by the legislature, and yet it was upheld as a valid exercise of this power. Once concede that the legislature had the power to prescribe the qualifications, and the methods by which those qualifications could be ascertained, it is difficult to see how the courts can interfere so long as the test prescribed has a relation to the qualifications required. It must also, I think, be conceded that; considering the relation that a physician bears to his patient and the acts that he is often required to do, which may or may not be criminal, depending upon the *bona fide* belief of the physician that they are necessary for the protection of the life and health of the patient, the character of the physician is an important element in determining whether he possesses the

necessary qualifications for the practice of his profession. The question, it seems to me, is whether the provisions of the statute which require that certain qualifications are required before an individual be allowed to practice the profession of medicine, and the test adopted to ascertain whether a physician assuming to practice has such qualifications, are, under the circumstances, reasonable. By the public health law, chapter 661 of the Laws of 1893, the State has attempted to prescribe general rules for the protection of the public health. This act provides for a State board of health and for local boards; prohibits the adulteration of food, drugs and medicine; relates to contagious and infectious diseases, their suppression and treatment; regulates the practice of medicine and dentistry and subjects relating thereto. By article 8 the practice of medicine in the State of New York is regulated, and by section 140 of the act the qualifications of those practicing medicine within the State are prescribed. It is there provided that no person
46 shall practice medicine after September 1, 1891, unless previously registered and legally authorized. "Nor shall any person practice medicine who has ever been convicted of a felony by any court, or whose authority to practice is suspended or revoked by the regents on recommendation of a State board." Provision is then made for the examination of candidates to practice medicine, and the qualifications that must be shown before a license to practice is granted. Then by section 153 of the act it is provided that "Any person who, * * * after conviction of a felony, shall attempt to practice medicine, or shall so practice * * * shall be guilty of a misdemeanor;" and it was for a violation of this section that the defendant was convicted. It appeared on the trial that this defendant had been convicted in the year 1878 of the crime of abortion. So, when this act took effect, he was not a person qualified to practice medicine under section 140, and by so practicing after the 1st of September, 1891, he was guilty of a violation of the act. He was convicted of practicing medicine in the city and county of New York in February, 1896. The act, therefore, did not make him guilty of an offense committed before the passage of the act. It was the act of practicing medicine when he was not, under the provisions of section 140 of the statute referred to, qualified to practice within this State that constituted the offense. The only question is whether the legislature had the power to require, as one of the qualifications of a physician, that he should be a man of good moral character, and that the fact that he had been convicted of a felony should be conclusive that he was not of such a character as would justify his being allowed to practice. If it is conceded that the legislature had the power to prescribe qualifications for those in practice at the time of the passage of the act, which would exclude some who were then practicing, and that a man of bad character should not be allowed to practice, upon what principle can it be said that it was beyond the power of the legislature to declare that a conviction of a felony should be evidence of the lack of the necessary quali-

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fications to entitle the person convicted to be allowed to
47 practice? In Dent *vs.* West Virginia (*supra*) the fact that a physician had practiced ten years prior to the passage of the act was evidence that he had the qualifications required, while the practice of nine years was not such evidence. Here the legislature has said that the fact that a person has been convicted of a felony shall prohibit him from practicing, not as an additional punishment, or as any punishment, for the offense for which he had been convicted, but as a test of his qualification. Was not the physician who had practiced five years in the case of Dent *vs.* West Virginia (*supra*) as much punished because of the fact that he had practiced less than ten years as was the defendant in this case punished because he had, prior to the time of the passage of the act, been convicted of a felony? In both cases the legislature had prohibited the defendant from practicing, and had provided that in case he should violate the provisions of the law and practice without the qualifications prescribed he should be guilty of a crime. The legislature having, concededly, the power to determine what should be the qualifications, and what tests should be applied to determine whether such qualifications existed, I cannot see how the court can say that where a test which provides that a ten years' practice is evidence of such qualification, and is valid, but that a test which provides that a conviction of a felony shows that the necessary qualifications did not exist is void. An examination of this whole act shows that it relates solely to the regulation of the public health, and not to the punishment of any one for any offense except for a violation of its provisions subsequent to the passage of the act; and when this defendant, in the face of this prohibition of the statute, practiced medicine within this State, he was guilty of a crime unless the prior conviction of a felony had no reasonable connection with the qualification, mental or moral, of those who should practice medicine.

The extremely interesting discussion of the question as to what is an *ex post facto* law in the case of Cummings *vs.* State of Mis-
48 souri (4 Wall., 277) and *Ex parte* Garland (*id.*, 334) does not seem to me to be applicable here.

In *Ex parte* Garland, Mr. Justice Field, in delivering the opinion of the court, at page 379, says: "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment against the prohibition of the Constitution." Applying this test, an examination of the act conclusively shows that this power has not been used here as a means for the infliction of punishment at all, but solely to prescribe the qualifications of a person practicing medicine within this State. The constitution of the State of Missouri in Cummings *vs.* State of Missouri (*supra*) and the act of the United States in *Ex parte* Garland (*supra*) were both held to be intended to inflict penalties for acts committed prior to the adoption of the constitution in one case and

the passage of the act of Congress in the other; and thus were held to be *ex post facto* laws and within the prohibition of the Constitution. Mr. Justice Field, who delivered the opinion of the court in the Cummings and Garland cases, speaking for the court in the case of Dent *vs.* West Virginia (*supra*), says of the first-named cases, "The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for the past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence these receiving a license under authority of the State." It seems to me that this applies to the case at bar.

49 Attention is called in the prevailing opinion to the fact that "this act strikes at the unfortunate man who in his youth may have violated the law and without real evil intent have committed and been convicted of any felony and pardoned the very day of his conviction as well as the hardened criminal guilty of as foul an offense as that of which this appellant was convicted." This suggestion is only attacking the propriety of the test which the legislature has established to determine whether or not the moral qualifications exist; and it might as well be said that the test provided for in Dent *vs.* West Virginia (*supra*) was not a perfect test, because a practice of five years in a large city would better qualify a person for the practice of medicine than a ten years' practice in a country district. It was for the legislature to establish the test, and as long as it had a reasonable connection with the object sought to be attained—that is, the qualification of the physician—its discretion is not subject to review. It certainly seems to me to be a not unreasonable test of the moral qualification of a man who is to be admitted to the intimate relation that must exist between a patient and a physician, that it should not appear by his past life that he had been guilty of a serious crime. As was stated by the court of appeals in the case of People *vs.* Havnor (149 N. Y., 201), "When thus exercised, even if the effect is to interfere to some extent with the use of the property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of the property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights."

I think the legislature had the power to say that a person who had been convicted of a felony did not have the necessary qualifications to practice medicine within this State, and that, therefore, the judgment should be affirmed.

50 *Stipulation.*

It is hereby stipulated that the foregoing are true and correct copies of the notice of appeal, the order and judgment appealed from and the papers on which the court below acted in making said

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order and judgment, and of the whole thereof, and of the opinion of the appellate division herein, and certification thereof is hereby waived.

Dated New York, February 25, 1897.

W. M. K. OLCOTT,
District Attorney, Attorney for the Appellants.
HUGH O. PENTECOST,
Attorney for the Respondents.

51 Court of General Sessions of the Peace, City and County of New York.

JUNE 22ND, 1897.

I certify that the annexed is a copy of an order now on file in the clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of said original.

{ Seal of New York Courts of Oyer & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL,
Clerk of Court.

At a term of the court of general sessions of the peace held in and for the city and county of New York, at the building for criminal courts, in the city of New York, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: —— ——.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants, *against* BENJAMIN HAWKER, Respondent. } Order on Remittitur.

Whereas heretofore, to wit, at a term of the court of general sessions of the peace in and for the city and county of New York, held at the criminal court building, in said city, on the seventeenth day of September, 1896, the above-named respondent was in due form of law convicted by the verdict of a jury of a misdemeanor, to wit, of practicing medicine after conviction of a felony, whereupon, to wit, on the said seventeenth day of September, 1896, it was considered by the said court and ordered and adjudged that the said respondent, for the misdemeanor aforesaid, whereof he was so convicted as aforesaid, should pay a fine of two hundred and fifty dollars, and that, in default of the payment of said fine, he should stand committed to the custody of the warden of the city prison of the city of New York until the same should be paid, not exceeding one day for each dollar of the fine imposed;

And whereas the respondent aforesaid thereafter duly appealed from the said judgment to the appellate division of the supreme court of the State of New York for the first department;

And whereas, at a term of the appellate division of the said supreme court, held in and for the first department, to wit, at the court-house thereof, in the city of New York, on the fifth day of February, in the year of our Lord one thousand eight hundred and ninety-seven, the said judgment of this court was by the judgment of the said appellate division, for errors of law and not for errors of fact, nor as a matter of discretion, in all things reversed;

And whereas the appellant aforesaid thereafter duly appealed from the judgment of the said appellate division to the court of appeals of the State of New York;

52 And whereas, at a term of the said court of appeals, held at the capitol, in the city of Albany, on the sixteenth day of March, in the year of our Lord on- thousand eight hundred and ninety-seven, the said judgment of the said appellate division was by the judgment of the said court of appeals in all things reversed and the judgment entered upon the conviction affirmed and the record herein and the proceedings in the said last-mentioned court upon the said appeal were by the said judgment remitted to this court, there to be proceeded upon according to law, as by the remittitur of the said court of appeals now on file in this court more fully appears:

Now, therefore, on reading and filing the said remittitur, and on motion of W. M. K. Olcott, Esquire, district attorney, it is—

Ordered that the said judgment of the said court of appeals be, and the same is hereby, made the judgment of this court; and it is further

Ordered that the said judgment of this court so appealed from as aforesaid and so affirmed be, and the same is hereby, directed to be enforced and carried into execution and effect.

Enter.

J. F., *J. G. S.*

53 [Endorsed:] The People, appellants, *vs.* Benjamin Hawker, respondent. Order on remittitur. Copy. W. M. K. Olcott, district attorney, criminal court building, New York city.

54 I, John F. Carroll, clerk of the court of general sessions of the peace, held in and for the city and county of New York, do hereby certify that the annexed is a copy of a bond for costs now on file in the clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom and of the whole of such original.

Given under my hand and attested by the seal of the said court this tenth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

{ Seal of New York Courts of Over & Terminer & Gen. Sess. of the Peace. }

JOHN F. CARROLL.

3d vol. R. S., 5th ed., § 74, p. 687.

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55 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c.,
against
BENJAMIN HAWKER. } Bond for Costs.

Know all men by these presents that we, Benjamin Hawker, principal, of 510 Third Ave., in the city of New York, and John Z. Gifford, surety, of 141 East Fifty-second street, of the same place, are held and firmly bound to the above-named People of the State of New York in the sum of two hundred and fifty dollars, to be paid to the said People of the State of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 7th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Benjamin Hawker has *been* prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named Benjamin Hawker shall prosecute said appeal to effect and answer all damages and costs if he fail to make said ap-
56 peal good, then this obligation shall be null and void; otherwise the same shall be and remain in full force and virtue.

BENJAMIN HAWKER. [SEAL.]
JOHN Z. GIFFORD. [SEAL.]

Sealed and delivered and taken and acknowledged this 7th day of April, 1897, before me—
SAMUEL FLEISCHMAN,
Notary Public, N. Y. Co.

Approved by—
JAMES FITZGERALD,
Judge General Sessions.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } ss:

John Z. Gifford, the above-named surety, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN Z. GIFFORD.

Sworn to this 7th day of April, A. D. 1897, before me—
SAMUEL FLEISCHMAN,
Notary Public, N. Y. Co.

Approved, as to form and sufficiency, April 7th, 1897.

W. M. K. OLCOTT, *Dist. Att'y.*

57 [Endorsed:] New York general sessions of the peace. The People of the State of New York against Benjamin Hawker. Bond for costs. Copy. Filed April 7th, 1897.

Endorsed on cover: Case No. 16,628. New York court of general sessions of the peace for the city and county of New York. Term No., 415. Benjamin Hawker, plaintiff in error, *vs.* The People of the State of New York. Filed July 14th, 1897.

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(5129)

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 415.

BANJAMIN W. HAWKER,
Plaintiff in error,

against

THE PEOPLE OF THE STATE OF NEW YORK.

Motion to Advance.

The defendants in error respectfully move the court to advance the above entitled cause on the docket and set the same down for hearing at such early day during the present term as will be convenient to the court.

The plaintiff in error was convicted in the Court of General Sessions of the Peace of the City and County of New York, at the September Term, 1896, of the misdemeanor of practicing medicine after having been convicted of a felony, in violation of a statute of the State of New York known as the Public Health Law, which provides that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor."
>
> Chap. 661, Laws of 1893, sec. 153, as amended by chap. 398, Laws of 1895.

The indictment alleged, and it was conceded on the trial that on the 6th day of March, 1878, the plaintiff in error was convicted in the Court of Sessions of the county of Kings, in the State of New York, of the felony of abortion, and was thereupon sentenced to imprisonment in the Kings County Penitentiary for the term of ten years, and that after such conviction, to wit: on the 22d day of February, 1896, he practiced medicine in the City and County of New York, by examining, treating and prescribing for one Dora Hoenig, as a physician.

At the time of the respondent's conviction (in 1878) of the felony of abortion, a conviction for that offense, whether committed by a physician or any other person, rendered the offender liable to a penalty of imprisonment and disfranchisement, as in all cases of conviction for felony; but the fact of a physician having been convicted of abortion or any other felony did not, at that time, of itself, disqualify him from subsequently practicing his profession, or render him liable to prosecution in case he did so; and no attempt was made to exclude convicted felons, *as such*, from the practice of medicine, till the year 1887 (nine years after the respondent's conviction) when the legislature passed an act which provided that—

> "No person shall be licensed or permitted to practice physic or surgery in this state who has been convicted of a felony by any court of competent jurisdiction; and if any person who is or hereafter shall be duly licensed to practice physic or surgery in this state, shall be convicted of a felony, as aforesaid, his or her license to so practice, if any, shall be revoked, by the fact of such conviction having been had. * * * Any person * * * who, after conviction of a felony, as aforesaid, shall attempt to practice physic or surgery in this state * * * shall be deemed guilty of a misdemeanor. * * *

Chap. 647, Laws of 1887, sec. 6.

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In 1893, the statutes regulating the practice of medicine were engrafted into and made a part of the statute called the Public Health Law, enacted that year (chap. 661, Laws of 1893), and the above-quoted provision of the Act of 1887, section 6, was enlarged so as to provide that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine * * * shall be guilty of a misdemeanor. * * *

Chap. 661, Laws of 1873, sec. 153.

And in 1895 the provision was made to apply in terms to persons who, after conviction of a felony actually practiced medicine, as well as those who attempted to do so.

Chap. 398, Laws of 1895 (*supra*).

The plaintiff in error demurred to the indictment upon the grounds—

(1.) That the Act of 1895, upon which the prosecution is based, is not retrospective in its operation, that is to say, does not apply to persons convicted of felonies previous to the time of its passage; and

(2.) That if construed as applying to persons convicted previous to its passage, then the act is, in that respect unconstitutional, as being *ex post facto* and void.

The demurrer was overruled, and on the trial the plaintiff in error admitted that all the facts set forth in the indictment were true, whereupon he was found guilty and sentence was imposed.

He thereupon appealed from the judgment of the General Sessions to the Appellate Division of the Supreme Court of the State of New York, and on the 10th day of February, 1897, the Appellate Division reversed the judgment.

The defendants in error then appealed to the Court of Appeals of the State of New York from the judgment of

reversal, and on the 16th day of March, 1897, the Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of conviction; whereupon the plaintiff in error sued out a writ of error for the purpose of bringing the question involved before this court for final adjudication.

This question, briefly stated, is whether the provision of the Public Health Law violated by the plaintiff in error is a lawful exercise of the police power of the State, or is an *ex post facto* law, or one in the nature of a bill of attainder, or a bill of pains and penalties, and thus included in the powers, the exercise of which is forbidden to the several States by the constitution of the United States.

The defendants in error contend that the legislation in question, being manifestly designed for the protection of the public health and safety against the danger, real or anticipated, of permitting convicted felons to practice, or to continue practicing medicine, and being calculated, intended, convenient and appropriate to accomplish that purpose, it must be upheld as a valid and reasonable exercise of the police power, even though its effect be to absolutely prohibit physicians convicted of felonies prior to its enactment from continuing the pursuit of their profession.

The desirability of procuring the final and authoritative settlement of a question of such manifest public concern, is, it is respectfully submitted, a proper ground for the granting of this motion.

Therefore, we submit that cause is shown, under Rule 26, why this case should be advanced.

Notice of this motion has been served on the attorney for the plaintiff in error, and proof of service filed with the Clerk of this Court.

JOHN D. LINDSAY,
Of Counsel for the defendants in error.

No. 415.

Brief of Pentecost for P. E.

FILED
NOV 10 1897
JAMES H. MCKENNEY
CLERK

Filed Nov. 10, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No 415.

BENJAMIN HAWKER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

HUGH O. PENTECOST,
Attorney for Plaintiff in Error.

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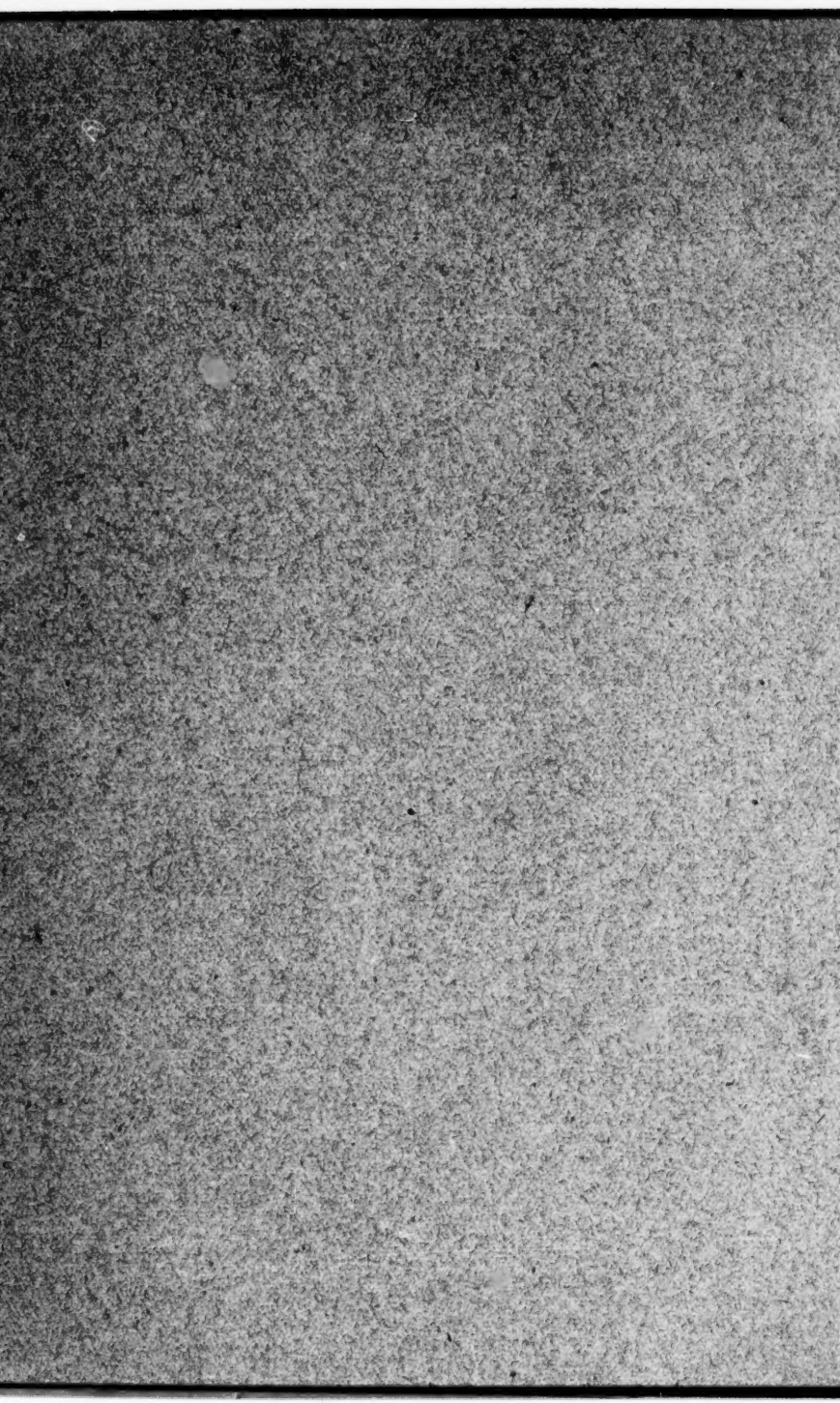

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Supreme Court of the United States.

OCTOBER TERM, 1897.

BENJAMIN HAWKER,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error,

No. 415.

Brief for the Plaintiff in Error.

Statement.

This is ~~an appeal~~ a writ of error by Benjamin Hawker, the plaintiff herein, from a judgment rendered by the Court of Appeals of the State of New York on March 16, 1897, reversing a judgment of the Supreme Court (First Department) of the State of New York, rendered against the defendant in error on February 5, 1897, dismissing the indictment against the plaintiff and discharging him from custody.

The plaintiff, Benjamin Hawker, was indicted by the Grand Jury of the City and County of New York on the 27th day of March, 1896, in two cases, in each of which plaintiff is charged with having violated Chap. 661 of the Laws of 1893, as amended by Chapter 398 of the Laws of 1895, in having practiced medicine

after conviction of a felony. Plaintiff was arraigned at the bar of the Court of General Sessions of the Peace, in and for the City and County of New York, in Part I thereof, for pleading, on the 7th day of April, 1896, at which time and place instead of pleading, plaintiff demurred to said indictments, on the ground that the facts stated therein do not constitute a crime, in that the statute alleged to have been violated is prospective in its application; or else, if it is not prospective in its application, it is null and void, as being in violation of Art. I., Sec. 10 of the Constitution of the United States, and of the fifth and fourteenth (Sec. 1) amendments to said Constitution, and also of Article I., Secs. 1 and 6 of the Constitution of the State of New York. The aforesaid indictments were discovered to be defective, in that they charged plaintiff with having committed a felony, and they were superseded by two other indictments, filed on the 30th day of April, 1896, in which said defects were cured. The demurrer previously interposed was allowed to apply to these said latter indictments, and, after argument, was disallowed by FITZGERALD, J., on the 23d day of July, 1896. On July 27th, 1896, plaintiff pleaded not guilty, and on September 17th, 1896, he was tried before the HON. JAMES FITZGERALD and convicted. On the same day judgment was pronounced upon plaintiff, and Judge FITZGERALD granted a certificate of reasonable doubt and admitted plaintiff to bail, pending appeal.

On the trial of the plaintiff no witnesses were examined. Plaintiff admitted to be true all the facts alleged in the indictment on which he was tried, and moved for a dismissal of the indictment, and that the jury be advised to acquit, on the grounds already set forth in the demurrer herein.

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POINT. I.

In practicing medicine, as alleged, after having been convicted of a felony, as alleged, defendant committed no crime.

First. *The statute should be construed prospectively.*

Plaintiff was indicted under Chap. 661 of the Laws of 1893, as amended by Chap. 398 of the Laws of 1895. In so far as these statutes bear upon the charge against plaintiff, the language is as follows:

> Any person who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor, etc. (Ch. 398, Laws of 1895).

It is a fundamental rule in construing statutes so worded as to admit of a construction which would render them retrospective as well as prospective, that a prospective construction is given, unless a legislative intent to the contrary be declared, or necessarily implied from the circumstances or the language used (Am. and Eng. Enc. of Law, vol. 23, p. 448).

Amsby vs. Hinds, 48 N. Y., 57.
Johnson vs. Burrell, 2 Hill, 238.
Fairbanks vs. Woods, 17 Wend., 329.
Wood vs. Oakly, 11 Paige, 400.
Quinn vs. New York, 63 Barb., 595.
Wilson vs. Baptist Education Soc., 10 Barb., 308.
Quackenbush vs. Danks, 1 Den., 126; 1 N. Y., 129.

There is nothing in the language of said statutes from which it must necessarily be implied that the

legislature intended them to be retrospective in their application.

The felony which it is charged this plaintiff committed prior to his practicing medicine in the year 1896, is alleged to have been committed in the year 1878—*fifteen years* previous to the passage of Chap. 661, Laws of 1893, and *seventeen years* previous to the amendment of that chapter in 1895, and nearly *eighteen years* previous to the indictments herein.

We are not to suppose, without good ground for doing so, that the Legislature of this State intended to deprive this defendant of his means of earning a living *as a penalty for a crime* committed and expiated many years ago, unless something in the language of the statute positively compels us to take that view of the case.

Another rule of interpretation and construction of statutes is that wherever a statute is capable of two constructions, one of which would work manifest injustice, and the other would work no injustice, it is the duty of the Court to adopt the latter, as it can scarcely be presumed that an injustice was within the legislative intent.

This rule is also too well known and too manifestly reasonable to require authorities in its support. We shall, therefore, content ourselves with referring to the case of Lau Ow Bew vs. United States, 144 U. S., 47, in which Chief Justice FULLER, delivering the opinion of the Court, said:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an injustice and absurd conclusion.

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The injustice of construing Sec. 398, Laws of 1895, retrospectively will be apparent by supposing a case which might easily come under its provisions; for example: It may well have happened twenty years ago that a college student in a sudden quarrel with a classmate might have assaulted him with an instrument calculated to do serious bodily harm; and, thereafter, might have been convicted of a felonious assault; and, thereafter, might have been discharged from custody by the Court under a suspension of sentence; and, thereafter, might have finished his college course and a medical course, and have become a medical practitioner, and have achieved great and deserved distinction in his profession, he being none the less a good citizen and a safe and reliable medical practitioner because of the circumstances which made him a felon in his early youth. If the statute now in question is to be construed as of retrospective application, such a distinguished member of the medical profession would be obliged to cease practicing or subject himself to a prosecution for misdemeanor.

The case supposed is not improbable, and should it arise under the law now in question, every sensible person would see the injustice and absurdity of a construction of the law which would result in depriving the community of the services of an eminent physician, and of depriving such a physician of his means of livelihood on account of a youthful indiscretion, committed many years before the law was passed. It was said by Judge EARL, in Stewart vs. Palmer (74 N. Y., 183), that "the constitutional validity of a law is to be tested, not by what has been done under it, but by *what may by its authority be done.*"

Second. *If said law is construed retrospectively, then it is null and void, because it is in conflict with the Constitution of the United States.*

Art. I., Sec. 10, of the Constitution of the United States forbids any State to pass

> any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts:

and the fifth amendment to said Constitution provides that

> no person shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law;

and these last provisions are embodied in the Constitution of the State of New York.

If Chapter 661, Laws of 1893, as amended by Chapter 398, Laws of 1895, is construed to be as of retrospective application, then this law is:

I. *An ex post facto law.*

A definition of an *ex post facto* law, which has ever since been substantially adopted, was given by CHASE, J., in Calder vs. Bull, 3 Dall. (U. S.), 386, and is as follows:

> FIRST. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
>
> SECOND. Every law that aggravates a crime and makes it greater than it was when committed.

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> THIRD. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.
>
> FOURTH Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offense in order to convict the offender.

The law in question in this case, if construed retrospectively, is *ex post facto* in that it "aggravates a crime and makes it greater than it was when committed," and in that it "changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

At the time when this defendant committed the felony alleged, it was not punishable by depriving him of the right to practice his profession in addition to serving a term in prison. The Legislature now enacts, years after he has paid his debt to the State, that he shall be still further punished for his crime by being deprived of his right to practice his profession; and that without trial. He is supposed by this law to cease practicing his profession, and thereby sit in judgment upon himself by thus making confession of his guilt.

It cannot be successfully claimed that the deprivation of the means of earning a living in the only manner known to this defendant is not a punishment. It is a punishment far greater, indeed, than that which he suffered by imprisonment for his crime as alleged in the indictment herein. This question has been settled by the opinion of Mr. Justice FIELD, in Cummings vs. The State of Missouri, 4 Wall., 321, in which, with many other things on the same subject, he says:

> The theory upon which our political institution rose is that all men have inalienable rights;

> that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Cummings, the defendant-appellant in that case, had been convicted in a trial Court for preaching the Gospel without taking an expurgatory oath prescribed by the Constitution of Missouri soon after the late Civil War.

The oath was to the effect that the person taking it had not been guilty of treason, etc., during the war, and the taking of the oath was a condition of holding public office, teaching school, practicing law, preaching the gospel, etc. The law requiring a person to take the oath or abandon his profession was declared unconstitutional by the U. S. Supreme Court, on the ground, among others, that the deprivation of rights involved in it was not a penalty for treason at the time the treason was committed, and, that, therefore, it was adding a punishment which did not attach to the crime when committed. This is exactly the situation in the case at bar, and the same reasoning holds.

It is not denied that the State has the right to prescribe the qualifications of practicing physicians in any manner necessary to protect the public from incompetent or dishonorable practitioners. It is not denied that the law under which this indictment is drawn may be good if it is construed prospectively. The Legislature may enact that any person convicted of a felony, or of certain felonies, subsequently to a given date must not thereafter practice medicine. That would put possible criminals on their guard. That

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would attach to felony, or to certain felonies, a punishment which it did not have before; and persons tempted to commit a felony, or certain felonies, would have to take that new punishment into account. But the Legislature has not the right to enact to-day that a person who committed a felony twenty years ago shall be deprived of a right which that felony did not deprive him of when it was committed. Citizens have a right to know exactly what penalty they must or may suffer if they commit a crime. That knowledge is presumably taken into account when they commit crimes. But they cannot know what the penalty for crime is if, twenty years after conviction, the Legislature can visit new and different punishments upon them.

If the law in question herein is construed retrospectively:

II. *It deprives the defendant of liberty and property without due process of law.*

The National Constitution forbids the passing of laws which deprive the citizen of life, liberty or property without due process of law. Liberty involves the idea of exercising one's powers and functions in any legitimate business, and property is any possession, material or immaterial, which has a money value. A physician's practice is just as much property as a nugget of gold or palace of marble. It is sometimes his only property. His competency to practice and his *clientele* are his capital, his stock in trade, his property, equally as if they were gross material things. But this law, construed retrospectively, strips him of both liberty and property at one fell sweep, without due process of law. There is no complaint, no examination, no confronting with witnesses, no trial, no jury, no judge. The Legislature becomes judge and jury,

and deprives him of everything but life, and, perhaps, in the end, of that, by annexing a new, strange and awful punishment to a crime committed and atoned for nearly twenty years ago. Mind and heart, reason and moral sense, recoil from such a situation. Even the elastic police power of the State cannot be stretched to such a length as this. If it could be, the Supreme Court of the United States would not have declared to be unconstitutional those sections of the Missouri Constitution which prohibited Confederate soldiers and Confederate sympathizers from teaching, preaching and practicing law in that State (4 Wall., 277-399).

Bertholf vs. O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
Livestock Association vs. Crescent City, etc., Co. (1 Abb. U. S. 388, 398).
Slaughter House Cases (16 Wall. 36, 106).
People vs. Marx (99 N. Y., 377).
Webster's Works, Vol. V., p. 487.
Dartmouth College Case, 4 Wheat., 519.
People vs. Gillson, 109 N. Y., 398, 399, 400, 401, 404.
Mugler vs. Kansas, 123 U. S., 661.

The court below held that this case does not show any deprivation of liberty or property for the reason that it appears nowhere in the record that the plaintiff in error is or ever was a regularly graduated physician. To this it may be replied that under the indictment herein that fact (which would be readily conceded by the respondents) could not have been proven; but, even so, the question here is not only one of deprivation of liberty and property, but of an *ex post facto* law. If the law in question here, when construed

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retrospectively, is unconstitutional, that is sufficient to warrant a judgment in favor of the plaintiff in error. The question we are seeking to have determined is not whether this plaintiff is a physician or not, but whether the law under which he is now under conviction is constitutional or not.

The Case of Dent vs. West Virginia.

In defendant's brief stress is laid on Dent vs. West Virginia, 129 U. S., 114. This case is not in point in the case at bar. Defendant in Dent vs. West Virginia was prosecuted to a conviction under a statute the sole purpose of which was to insure professional competency in a physician. Said statute required, in substance, that a practicing physician must have a diploma from a reputable medical college, or must have practiced medicine in said state continuously for a period of ten years prior to a given date, or must submit to an examination before a state board of health. Defendant (Dent) was prosecuted to a conviction for practicing without a diploma, as aforesaid, and without having practiced ten years, as aforesaid, or having passed an examination, as aforesaid. The United States Supreme Court properly affirmed the judgment against Dent on the principle that

> the power of the state to provide the general welfare of its people authorizes it to prescribe such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud (p. 122).

The Court goes on to say:

> The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by such reasonable study and application that they can operate to deprive one of his right to pursue a lawful vocation (p. 122).

It will be observed that the Court announces a principle favorable to the plaintiff in the case at bar when it says "that the nature of the qualifications of a physician required by the state must be appropriate to the calling or profession and *attainable by reasonable study or application;*" and when it says further that when such required qualifications "have no relation to such calling or profession or are *unattainable by such reasonable study or application*" it is beyond the constitutional province of the state to prescribe them.

Dent "by reasonable study or application" could meet the requirements of the statute in his case, but in the case at bar the statute requires what this defendant "by reasonable study or application" could not attain.

It is believed that the only cases bearing upon the questions now in issue are the following:

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Cummings vs. Missouri, 4 Wall., 277.
Ex parte Garland, 4 Wall., 333.
Ex parte Tenny, 2 Duv. (Ky.), 351.
Ex parte Law, 35 Ga., 285.
Matter of Dorsey, 7 Port (Ala.), 293.

and some other cases which have followed the first two of the foregoing; notably

Greene vs. Shumway, 39 N. Y., 418.

In conclusion, the Court is respectfully referred to Cummings vs. The State of Missouri and to *Ex parte* Garland, 4 Wall. (U. S.), 277-399, and to Greene vs. Shumway, 39 N. Y., 418, which cases are on all fours with the case at bar, and in which the questions involved herein are fully discussed by eminent counsel on either side and by the Court.

The indictments herein should be dismissed and the plaintiff discharged, for the reason that if the law under which they were drawn is prospective the plaintiff has not violated it; but if the law is retrospective it is null and void for unconstitutionality.

Respectfully submitted.

HUGH O. PENTECOST,

Attorney for Plaintiff in Error.

836 West End Ave.,

New York City.

Supreme Court
FILED
NOV 5 1897
JAMES H. McKENNEY

No. 415.

Brief of Lindsay for D. E.

Filed Nov. 5, 1897.

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in-error,

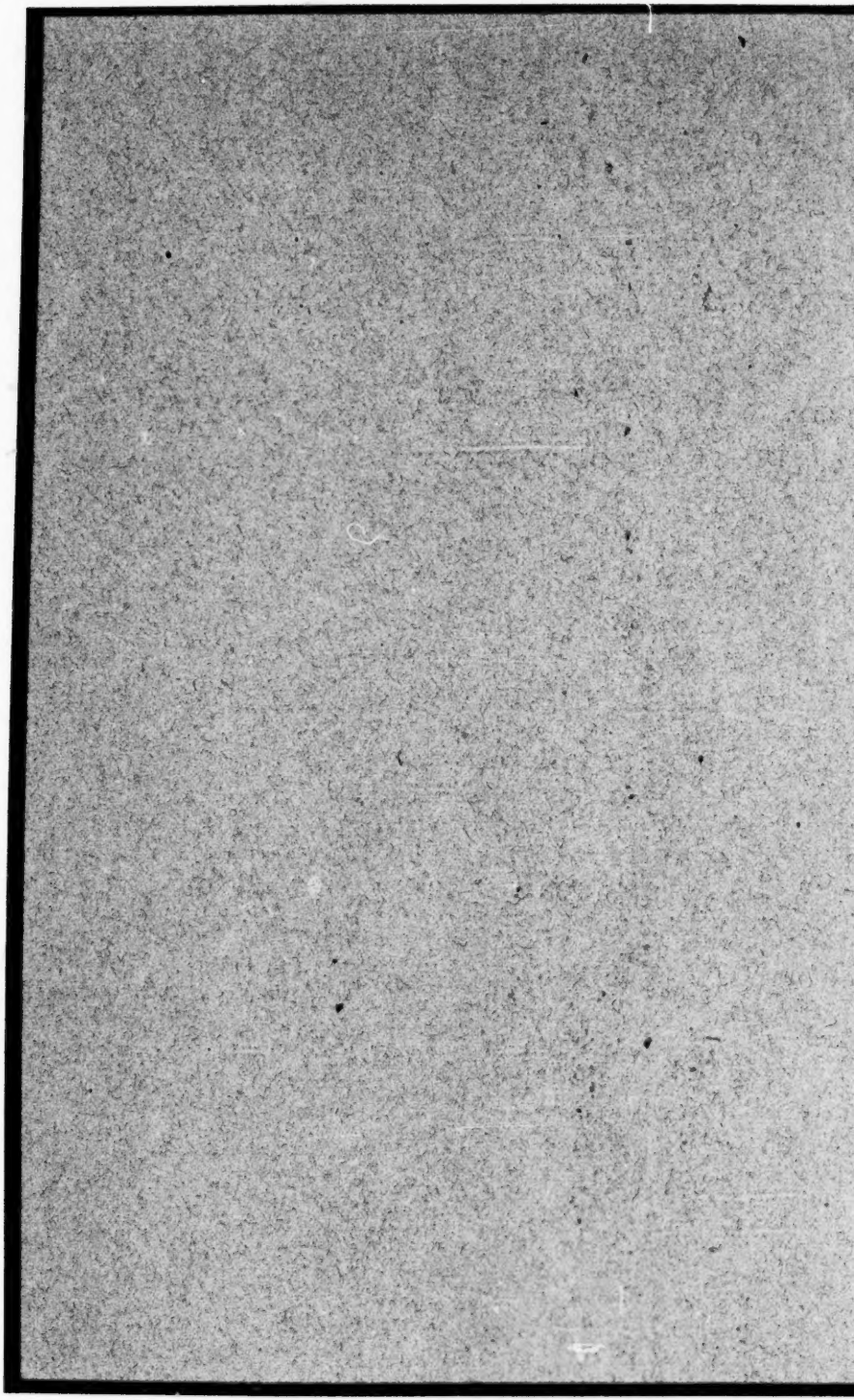
v.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-error.

BRIEF FOR THE DEFENDANT-IN-ERROR.

W. M K. OLCOTT,
DISTRICT ATTORNEY.

JOHN D. LINDSAY,
ROBERT C. TAYLOR,
Of Counsel.



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BENJAMIN W. HAWKER,
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Statement.

The plaintiff in error was convicted in the Court of General Sessions of the Peace of the City and County of New York, at the September Term, 1896, of the misdemeanor of practicing medicine after having been convicted of a felony, in violation of a statute of the State of New York known as the Public Health Law, which provides that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor."
>
> Chap. 661, Laws of 1893, sec. 153, as amended by chap. 398, Laws of 1895.

The indictment alleged, and it was conceded on the trial that on the 6th day of March, 1878, the plaintiff in error was convicted in the Court of Sessions of the County of Kings, in the State of New York, of the felony of abortion, and was thereupon sentenced to imprisonment in the Kings County Penitentiary for the term of ten years, and that after such conviction, to wit: on the 22d day of February, 1896, he practiced medicine in the City and County of New York, by examining, treating and prescribing for one Dora Hoenig, as a physician.

At the time of the respondent's conviction (in 1878) of the felony of abortion, a conviction for that offense, whether committed by a physician or any other person, rendered the offender liable to a penalty of imprisonment and disfranchisement, as in all cases of conviction for felony; but the fact of a physician having been convicted of abortion or any other felony did not, at that time, of itself, disqualify him from subsequently practicing his profession, or render him liable to prosecution in case he did so; and no attempt was made to exclude convicted felons, *as such*, from the practice of medicine, till the year 1887 (nine years after the respondent's conviction) when the legislature passed an act which provided that—

> "No person shall be licensed or permitted to practice physic or surgery in this state who has been convicted of a felony by any court of competent jurisdiction; and if any person who is or hereafter shall be duly licensed to practice physic or surgery in this state, shall be convicted of a felony, as aforesaid, his or her license to so practice, if any, shall be revoked, by the fact of such conviction having been had. * * * Any person * * * who, after conviction of a felony, as aforesaid, shall attempt to practice physic or surgery in this state * * * shall be deemed guilty of a misdemeanor. * * *"

Chap. 647, Laws of 1887, sec. 6.

In 1893, the statutes regulating the practice of medicine were engrafted into and made a part of the statute called the Public Health Law, enacted that year (chap. 661, Laws of 1893), and the above-quoted provision of the Act of 1887, section 6, was enlarged so as to provide that—

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Chap. 398, Laws of 1895 (*supra*).

The plaintiff in error demurred to the indictment upon the grounds—

(1) That the Act of 1895, upon which the prosecution was based, is not retrospective in its operation, that is to say, does not apply to persons convicted of felonies previous to the time of its passage; and

(2) That if construed as applying to persons convicted previous to its passage, then the act is, in that respect unconstitutional, as being *ex post facto* and void.

The demurrer was overruled, and on the trial the plaintiff in error admitted that all the facts set forth in the indictment were true, whereupon he was found guilty and sentence was imposed.

He thereupon appealed from the judgment of the General Sessions to the Appellate Division of the Supreme Court of the State of New York, and on the 10th day of February, 1897, the Appellate Division reversed the judgment.

The defendant in error then appealed to the Court of Appeals of the State of New York from the judgment of reversal, and on the 16th day of March, 1897, the Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of conviction; whereupon the plaintiff in error sued out a writ of error for the purpose of bringing the question involved before this court for final adjudication.

This question, briefly stated, is whether the provision of the Public Health Law violated by the plaintiff-in-error is a lawful exercise of the police power of the State, or is an *ex post facto* law, or one in the nature of a bill of attainder, or a bill of pains and penalties, and thus included in the powers, the exercise of which is forbidden to the several states by the constitution of the United States.

The defendant-in-error contends that the legislation in question absolutely excludes all persons who have been at any time convicted of felonies, whether otherwise qualified or not, from the right of practicing medicine in the state of New York, and that being manifestly designed for the protection of the public health and safety against the danger, real or anticipated, of permitting convicted felons to practice, or to continue practicing medicine, and being calculated, intended, convenient and appropriate to accomplish that purpose, it must be upheld as a valid and reasonable exercise of the police power of the state.

First—The intention of the legislature that the statute should prohibit all persons from practicing medicine who had been theretofore, or who should thereafter, be convicted of a felony, is apparent from a reading of the statute itself.

While the words of the Act of 1887 may have been intended to apply only to the latter class, the Acts of 1893

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and 1895 admit of no such construction. The language is clear and unambiguous, and prohibits the practice of medicine by—

> "any person * * * after conviction of a felony."

Apart from the clear meaning of these words, the policy of the law to exclude all persons convicted of felony is shown by another section of the Public Health Law (L. 1893, chap. 661, sec. 140):

> "Nor shall *any person* practice medicine who has *ever been convicted of a felony by any court*, or whose authority to practice is suspended or revoked by the regents on recommendation of a state board."

Thus it is obvious that the present law was intended to absolutely forbid the practice of medicine by felons. Section 140 plainly says they shall not practice, and section 153 makes the violation of this prohibition a misdemeanor.

In the sense that the statute was intended to apply to all persons convicted before its passage, as well as those subsequently convicted, it is therefore clearly retrospective in its operation.

Second—The police power extends to the protection of persons and property within the state. In order to secure that protection either may be subjected to restraints and burdens by legislative acts. The individual must sacrifice his particular interest or desires, if the sacrifice is a necessary one, in order that organized society as a whole shall be benefited. Restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated.

If the legislation is calculated, intended, convenient or appropriate to accomplish the good of protecting the public health and of serving the public comfort and safety, the exercise of the legislative discretion is not the subject of judicial discretion.

> "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control; and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide*, for the protection of the public, is beyond the reach of judicial inquiry."
>
> Louisville & Nashville Ry. *vs.* Kentucky, 161 U. S., 677 (at p. 700).

The exercise of the police power of the state does not deprive anybody of life, liberty or property within the meaning of the Fourteenth Amendment.

> Barbier *vs.* Connelly, 113 U. S., 27.
> Powell *vs.* Pennsylvania, 127 U. S., 678, 683.
> *In re* Rahrer, 140 U. S., 545.
> Giozza *vs.* Tiernan, 148 U. S., 657.
> R. R. Co. *vs.* Bristol, 151 U. S., 556.

Third—In the exercise of its police power the state has the absolute right to make such laws as it may deem proper, regulating the practice of medicine or surgery, and prescribing the conditions upon which any person will be allowed to practice such professions within its territorial limits.

> Dent *vs.* West Virginia, 129 U. S., 114.
> People *ex rel.* Nechamcus *vs.* Warden, 144 N. Y., 529 (at p. 539).

Eastman *vs.* State, 109 Ind., 278.
Orr *vs.* Meek, 111 Ind., 40.
Richardson *vs.* State, 47 Ark., 562.
State *vs.* State Board, 32 Minn., 324.

That power is not confined to the dictation of terms, or the requirement of qualifications, preliminary to the acquirement of an original permission to practice, but also includes the authority to impose new and additional conditions upon which one already engaged in the actual practice of the medical or surgical profession is permitted to continue such practice.

The same reasons that control in imposing conditions upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as a qualification for his continuance in practice, and a failure to meet such further qualification justifies his exclusion from the right to practice.

The nature and extent of the qualifications required must rest primarily upon the judgment of the state imposing them, subject only to the limitation that they must have some reasonable relation to the profession, and are designed to secure the public welfare.

Fourth—The claim that the statute operates to unlawfully deprive the plaintiff in error of a right of property, viz., his ability to earn a living by the practice of medicine, and that the effect of this deprivation is to aggravate his punishment for the offense of which he was convicted in 1878, cannot avail the defendant here, for there is nothing before this court to show that he was ever qualified or authorized under the laws of the State of New York to engage in such practice.

It does not appear from the record that he ever studied medicine, that he ever received a diploma from any medical college or university, that he was ever registered or licensed to practice medicine, or that he ever did, in fact, practice as a physician before the 22d day of February, 1896.

Fifth—But even though it were to be conceded that the plaintiff in error possessed, at the time of the passage of the statute under consideration, all the qualifications essential, under the then existing laws, to entitle him to practice medicine, and was at that time lawfully engaged in such practice, the enactment cannot be held to have deprived him of any *vested right*.

There is no vested right in the physician to follow his profession. So long as he possesses such qualifications as the legislature may legitimately impose, and abides by its regulations, he is privileged to enter upon and continue its practice, but beyond this his rights do not extend. Practically a practitioner of medicine is merely a licensee:

> "And some employments in which integrity is of vital importance it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable" (referring to the practice of medicine as one of these employments).
>
> Cooley's Cons. Lim. (6th Ed.), p. 745.

To the same effect, see—

Richardson *vs.* State, 47 Ark., 562.
Orr *vs.* Meek, 111 Ind., 40.
State *vs.* State Board, 32 Minn., 324.
Logan *vs.* State, 5 Tex. App., 306.
Ex parte Spinney, 10 Nev., 323.
Hewitt *vs.* Chavier, 16 Pick., 353.
Fox *vs.* Wash. Ter., 5 West Coast R., 339.

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The case of Dent *vs.* West Virginia (*supra*), arose upon a statute requiring all physicians, as a condition of being permitted to follow their profession, to either possess a diploma of a kind prescribed in the act, *or* to have actually practiced medicine ten years, and making the practice of medicine without such qualification a misdemeanor.

The defendant, who had no such diploma, but had actually practiced medicine for the five years immediately preceding the passage of the law—a perfectly lawful thing, and consequently a thing he had a *right* to do, till that time—continued his practice thereafter, and for so doing was convicted of a misdemeanor.

In his behalf it was urged (129 U. S., p. 121) that the denial of the right to practice his profession without the required certificate constituted an unlawful deprivation of his vested right and estate in his profession.

But this court held otherwise, and sustained the act as a proper exercise of the police power. Justice Field, delivering the opinion of the court, sustained the validity of the statute upon these grounds:

(1) There is no arbitrary deprivation of any such right where the exercise of a calling is not permitted because of a failure to comply with conditions imposed by the state for the protection of society, or to secure the public against the consequences of ignorance or incapacity, or the possibility of *deception and fraud* (p. 122).

(2) The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. *It is only when they have no*

relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation (p. 122).

(3) The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions (p. 123).

Sixth—Applying these principles to the case at bar, the only question to be considered is whether the exclusion of convicted felons from the practice of medicine will secure, or tend to secure, the general welfare, health or prosperity of the people against dangers, real or anticipated. We most confidently submit that it will.

(*a*) Learning, skill and experience are indeed primarily essential qualifications in a physician or surgeon; but it is quite as important, if not of paramount concern to the community, that the physician or surgeon who may be called upon to attend any citizen in the gravest peril should be a person who has not forfeited his right to public confidence.

That a convicted felon does forfeit his right to public confidence by the fact of his conviction cannot in reason be denied.

In all transactions involving considerations of trust and honor people commit their interests to men of high character and probity, and avoid those whose reputations are not above reproach. What relations in life are more close and sacred, and require greater confidence on the one side, and honor and integrity on the other, than those between the physician and his patients? In what other profession or field of occupation can greater public danger lie in the

possibility of criminal misconduct than in the medical profession?

(*b*) It cannot be reasonably argued that the legislature has not the right to prescribe as one of the conditions of a physician's privilege to practice, or to continue in practice, that he shall be a person of good moral character—obviously one of the most essential personal and individual attributes of the physician, the absence of which would directly impair his usefulness.

(*c*) The policy of the state of New York has always been, and since 1880 has been evidenced by express legislation, to require all candidates for licenses to practice to be "of good moral character."

See—

Chap. 513, Laws of 1880, sec. 4.
Chap. 507, Laws of 1890, sec. 8.

Similar requirements are prescribed in nearly all the other states:

Ala., Code, 1887, secs. 1297–1304.
Ark., Act XIV., 1893, sec. 2.
Cal., Act 1877–78, chap. 576.
Ill., Laws 1887, p. 225, sec. 1.
Kan., Gen. Stat., 1889, sec. 2450; Act 1893, April 10, sec. 2.
La., Const., 1879, Art. 178; Act 1882, No. 31, sec. 5.
Maryland, Act 1892, chap. 296.
Mass., Act 1894, chap. 459.
Me., R. S., 1883, chap. 13, sec. 9.
Minn., Act 1887, chap. 9, sec. 3.
Mo., Rev. Stat., 1889, sec. 6871.
Montana, Act Feb. 28, 1889, sec. 4.
Miss., Code 1892, secs. 3244, 3245.
Neb., Act 1891, chap. 35, sec. 19.

New Mexico, Comp. L. 1884, sec. 2562.
N. Car., Code 1883, sec. 3133.
Oklahoma, Comp. Stat. 1893, sec. 352.
Ohio, S. & B.'s Rev. St. 1890, sec. 4403.
Oregon, Act Feb. 1889, sec. 9.
Penn., Act May 18, 1893, sec. 13.
S. Car., Act 1890, chap. 454, sec. 2.
S. Dak., Act Feb. 16, 1893, secs. 5, 6.
Utah, Act 1892, chap. 72, sec. 8.
Vermont, Rev. Laws 1880, sec. 3915.
W. Va., Code 1890, chap. 150, sec. 10.

In the Minnesota case, before cited, an application for a license to practice medicine was refused on the ground that the Examining Board had determined the applicant's character to be bad. In denying a motion for a mandamus to compel the issuance of the license, Dickinson, *J.*, said:

> "But the legislature has surely the same power to require, as a condition of the right to practice this profession, that the practitioner shall be possessed of the qualifications of honor and good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority in the exercise of its general police power to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them *unfit to be trusted* with the discharge of its duties."

State *vs.* State Board, 32 Minn., 324.

(*d*) The same conditions which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions.

Dent *vs.* West Virginia (*supra*), at p. 123.

It is therefore perfectly clear that the state has a right at any time to exclude persons who are not of good moral

character from further practicing, although such requirement did not exist at the time they originally acquired permission to practice, regardless of the time their character became bad.

(*e*) The legislature has the right to declare the public danger to be as great from the practice of convicted felons, as from the practice of any other persons of bad moral character.

The very fact of conviction of a felony renders the offender an object of distrust. Formerly he was incapacitated from giving evidence, and even now, though under the laws of the State of New York, he is a *competent* witness—

> "the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question."
>
> New York Penal Code, sec. 714.

(*f*) We confidently submit that the exclusion of convicted felons from the practice of medicine most directly tends to protect the public against the possibility of fraud, deceit and professional misconduct.

Whether regarded as a legislative declaration that a convicted felon is, because of that fact, a person of bad moral character, or as a declaration that his conviction has deprived him of the right to public confidence, regardless of the question of his actual character, the conclusion is irresistible that the provision excluding all such convicts from the practice of the profession, was designed to benefit the welfare of the people, has *some* relation to the profession, and does, to some degree at least, tend to secure the public against deception and fraud. Under these circumstances

it must be upheld as a valid exercise of the police power, regardless of its possible hardship in any individual case.

Seventh—The courts will always assume that the object of the legislature was solely to promote the public comfort, welfare and safety; and if an act admits of two constructions that should be given to it which sustains it and makes it applicable in furtherance of the public interests.

It is argued on behalf of the plaintiff-in-error that the state may not take cognizance of the danger to which the public is liable from the practice of medicine by convicted felons, and may not, in order to remove such source of danger, exclude such felons from the medical profession as persons who have forfeited their right to the trust and confidence so essential to its practice, because by so doing the state would be punishing them again for offenses, the penalties of which they had already paid.

We respectfully submit that, even if the act under consideration were capable of being construed in accordance with this contention, *i. e.*, as inflicting an additional punishment for a past offense, it is also clearly susceptible of another and wholly different construction, obnoxious to no constitutional objection, namely, that no additional penalty was sought to be imposed for the past offense, but was to be incurred, and could only be incurred, by those who, in defiance of the legislative provision, persisted in continuance in practice as physicians after the legislature, for manifestly good cause, had excluded them from such practice.

No additional punishment is imposed for the felony committed before the passage of the act. The statute prohibits a felon engaged in the practice of medicine at the

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time of its enactment from continuing such practice, and if he violates the prohibition he commits a misdemeanor, for which he is punishable, wholly independent of the anterior crime. He is punished solely for his disobedience of the legislative mandate and after its enactment, and for nothing else.

Except for the nature of the disqualification the situation is precisely the same as that which arose in Dent *vs.* West Virginia (*supra*). There, upon the passage of the statute, the defendant, till that time lawfully engaged in the practice of his profession, became by legislative declaration disqualified from further practice because he had practiced for but five years instead of ten, and was not therefore a proper person to be thereafter entrusted with the responsible duties of the medical profession. Here, upon the passage of this statute, the defendant, till that time lawfully engaged in the practice of his profession, became, by legislative declaration, disqualified from further practice because he had been in the past convicted of a felony and *was then a convicted felon*, and was not therefore a proper person to be thereafter entrusted with the responsible duties of the profession.

In the Dent case the legislature of West Virginia imposed a qualification dependent on an arbitrarily determined period of experience. In the case at bar the qualification depends on the practitioner's character. In both cases the disqualification existed at the time of the passage of the act, and at the time of the alleged violation of its provisions. The offense consisted, not in the fact constituting the disqualification, but in practising, notwithstanding such disqualification, in defiance of the legislative prohibition.

In the Dent case the defendant had a perfect right to follow his profession up to the time of the passage of the act making a diploma or a ten years' practice a qualifica-

tion, and the absence of such diploma or less than ten years' experience a disqualification for future practice.

So, in the case at bar, the plaintiff-in-error, assuming him to have been a qualified practitioner at the time of the passage of the act making a conviction for a felony at any time before or afterward a disqualification, had a perfect right to follow his profession up to that time.

The state does not punish him because he was once convicted, but because, in defiance of its mandate, and after its provisions became operative, he persisted in the performance of a practice it had declared to be against public policy and inimical to the general welfare.

And this was precisely the situation in the Dent case, with the additional circumstance that there the defendant, who had not been convicted of any crime, and had been lawfully engaged in practice for five years, was adjudged guilty of a misdemeanor for the mere act of continuing the practice after the legislature had declared ten years' practice to be a prerequisite qualification therefor.

Eighth—The cases of Cummings *vs.* Missouri, 4 Wall., 277, and *Ex parte* Garland, *Ibid.*, 333, upon which the plaintiff in error mainly relies, are in no sense analogous to the case at bar. In both of those cases attempts were made by legislative enactments to deprive individuals of the right to pursue their lawful avocations for no cause legitimately affecting their qualifications therefor, and this court very properly held the legislation to be unconstitutional and void. It is to be noticed that in both of these cases the statute did not in terms disqualify the party in interest because of any past act of misconduct, but undertook to compel him *to do something*, viz.: take a test oath as a condition of being permitted to continue in the pursuit of his calling.

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In Cummings *vs.* Missouri the plaintiff-in-error, a Roman Catholic clergyman, at the close of the war could not, or would not, take a test oath to the effect that he had not sympathized with the South during the Rebellion. The Constitution of Missouri denied to those who could not take the test oath the right to follow any profession, and Cummings was prosecuted for misdemeanor for pursuing his profession—namely, that of a clergyman—not having taken the test oath.

This court held that the oath was *void*, stating among its reasons that the only proper qualifications for the privilege of pursuing any given pursuit or profession must be such as relate to the fitness or capacity of the party for such pursuit or profession; that the "test oath qualification bore no possible relation" to Cummings's fitness for his profession (p. 319); and that the disability prescribed for failure to take the oath created constituted punishment (p. 320).

The case of *Ex parte* Garland was similar to the case of Cummings. It was decided by this court at the same time, and also related to the power of imposing a test oath, and only differed from the former in that the defendant was an attorney in the United States courts, and the law in question was an act of Congress. The two cases were substantially disposed of together, for each opinion refers freely to the facts and circumstances of the other case. In holding the act unconstitutional, Mr. Justice FIELD apparently laid stress upon these facts, viz.:

The clauses of the test oath "all relate to past acts" (p. 376); the statute was directed against parties who had offended; its object was to exclude them from the practice of the law in the United States courts (p. 377); the profession of the attorney and counselor is not like an office created by an act of Congress, which depends for its continuance, its powers and its emoluments upon the will of its

creator; the attorney is not an officer of the United States, but of the court (p. 378); and finally *that the pardon blotted out the offender's guilt* (pp. 380–1).

It is of interest to note that both of these cases were decided by an almost equally divided court. Both cases proceeded upon the principle that a test oath for past conduct could in no wise be considered the imposition of a valid qualification; and *that the statutes were manifestly intended solely as punishment for past conduct.*

These cases were sought to be invoked twenty years later on behalf of the defendant in the Dent case (Dent *vs.* West Virginia, *supra*) as authorities against the constitutionality of the statute there under consideration. But the doctrine was held to be inapplicable to the questions there involved, this court saying:

> "There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the employ of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions *by the exaction* from them of an oath as to their past conduct respecting *matters which have no connection with such professions.* Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The Constitution of Missouri and the act of Congress in question in those cases were *designed* to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no *bearing upon their fitness* to continue in their profession. *The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state*" (p. 128).

Ninth—The right of the state to withhold, for any legitimate cause, any privilege subject to legislative control, is not to be disputed, and laws withholding such privilege and punishing its subsequent use because of past misconduct resulting in a *present unfitness* to enjoy it, have uniformly been upheld.

The authorities are in perfect accord that the enjoyment of a privilege dependent on qualifications determinable solely by the state itself, may be at any time absolutely prohibited for any proper cause, provided only the cause has some relation to the prohibition, and does in fact constitute a valid reason for it.

Thus in Murphy *vs.* Ramsey, 114 U. S., 15, an act of Congress of March 22, 1882, abridged the right of electors in the territories under previous laws, by denying to bigamists any further right to vote.

It was claimed that this law was *ex post facto* as to those who were already bigamists, but this court held otherwise, saying (per Matthews, *J.*):

> "It is argued that * * * to do so would give the statute a retrospective effect, and by thus depriving citizens of civil rights, merely on account of past offenses, or on account of acts which when committed were not offenses, would make it an *ex post facto* law, and therefore void (p. 40). * * * It is not because the person has committed the offense * * * and as an additional punishment for its commission that he is disfranchised (p. 42). * * * Upon this construction the statute is not open to the objection that it is an *ex post facto* law. It does not seek * * * to operate as a punishment upon any offense at all. The disfranchisement operates upon *the existing state* and condition of the person, and not upon a past offense. He alone is deprived of his vote who, when he offers to register, is *then in the state or condition* of a bigamist (pp. 42, 43). * * * It is precisely similar to an inquiry into the fact of nativity, of age, or of *any other status*

made necessary by law as a condition of the elective franchise (p. 43).

"*It rests with Congress* to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers or the making of its laws; and it may therefore take away from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as *it may deem expedient*" (p. 44).

And so in the case at bar the prohibition of the statute operates solely upon the *existing state and condition* of persons engaged in the practice of medicine, and not upon their past offenses. He alone is deprived of his right to practice who, when the act is passed, is then in a state or condition, such as, upon grounds of the soundest public policy, renders him, in the judgment of the legislature, an unfit person to practice.

In Washington *vs.* State, 75 Ala., 582; s. c. 51 Am. Rep., 479 (1884), the indictment was for voting after conviction of a felony. The defendant was convicted in 1871. The disqualification was caused by the constitution of 1875. Said the court, per Somerville, *J.*:

"It is quite common, also, to deny the right of suffrage * * * to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot-box. * * * The presumption is that one rendered infamous by conviction of felony or other base offense, indicative of moral turpitude is *unfit to exercise the privilege of suffrage.* * * * It is proper, therefore, that this class should be denied a right, the exercise of which *might sometimes hazard* the welfare of communities. * * * The exclusion must, for this reason, be adjudged a mere disqualification, imposed *for protection and not for punishment* * * * withholding an honorable privilege, and not denying a personal right or attribute of personal liberty. * * * The clause of the Constitution * * *

> cannot, for the foregoing reasons, be considered as either an *ex post facto* law * * * or as in the nature of a bill of attainder. * * * It neither takes away any legal right nor imposes any legal burden."

So, following the same rule, in Foster *vs.* Police Commissioners, 102 Cal., 483 (May, 1894), it was held that a retrospective ordinance depriving persons of the right to a liquor license who had been convicted of felony, or who had carried on the business of selling liquors in places of amusement where females were employed, was not an *ex post facto* law, but simply furnished a standard applicable to all persons by which their fitness to conduct a business, in itself dangerous to the morals and good order of the city, was to be measured. Said the court, per Haynes, *J.*:

> Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is *evidence of the unfitness of such persons as a class;* nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before.

In United States *vs.* Chew Cheong, 61 Fed. Rep., 200 (April, 1894), a Chinaman had been convicted of a felony. Afterward his right to take out a certificate to prevent his deportation was denied by a statute prohibiting the taking out of such certificates by persons convicted of felony.

It was claimed the law was *ex post facto* as to him, but the court held otherwise, saying, per Morrow, *J.*:

> "The law was not *ex post facto:* for the government had the inalienable right to expel all aliens; and to select criminals for deportation was the exercise of a just discrimination in the administration of the

laws and a wise authority in preserving the institutions of the country."

Conclusion—The judgment of the court below should be affirmed.

Respectfully submitted,

WM. K. OLCOTT, District Attorney.

ROBERT C. TAYLOR,

JOHN D. LINDSAY, Assistants,

Of Counsel for the Defendant in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

STATEMENT.

This is an appeal from a judgment of the Court of Appeals of the State of New York, entered March 16th, 1897, reversing a judgment of the Appellate Division of the Supreme Court for the First Department, entered February 10, 1897, which last judgment had reversed a judgment of the Court of General Sessions entered September 17, 1896.

The defendant was convicted under section 153 of the Public Health Law (chap. 661, Laws 1893, as amended by chap. 398, Laws 1895) for the misdemeanor of **practicing medicine after conviction of a felony.**

This prosecution has been brought upon the complaint of the Medical Society of the County of New York under the provisions of section 153 of the

Public Health Law, by which the medical societies of the different counties are made *ex-officio* complainants in cases of this character.

It is and has been for some years the policy of the New York law to **deny to felons** the right to practice medicine; and if a felon does practice, he is amenable to punishment for a misdemeanor.

In **March, 1878,** defendant had been convicted of a felony—abortion.

In **February, 1896,** he practiced medicine in the City and County of New York.

In **April, 1896,** he was indicted for the practice of medicine last named.

The defendant demurred to the indictment upon the grounds—

(1) That the statute was **not retrospective** and did not extend to felonies committed before its passage, or—

(2) That if it was retrospective, then it was **ex post facto** as to him, and void.

The demurrer was afterward overruled and the defendant was convicted upon September 17, 1896, and fined $250. He thereupon appealed from the judgment and from the decision overruling the demurrer.

No facts whatever are in dispute. The appeal turns wholly upon **questions of law.**

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POINT I.

As to defendant's claim that the statute is only prospective in its operation.

The defendant claims that it was not the intention of the Medical Law in the State of New York to apply to persons who had been convicted of felony **before its passage.**

The most effective answer to this claim is that the defendant's own attorney apparently places but little faith in it. He urges it, apparently to save the point; but soon passes over to his main contention.

The words of the law are, however, too plain to admit of any refined construction.

> "**Any person** * * * **who, after conviction of a felony,** shall attempt to practice medicine, or shall so practice * * * shall be guilty of a misdemeanor. * * *"
>
> L. 1895, chap. 398, amending L. 1893, chap. 661, sec. 153.

Apart from the clear meaning of these words, the policy of the law to exclude all persons convicted of felony is shown by another section of the present Medical Law (L 1893, chap. 661, sec. 140):

> "Nor shall **any person** practice medicine who has **ever been convicted of a felony by any court,** or whose authority to practice is suspended or revoked by the regents on recommendation of a state board."

The Courts below held that the statute was retrospective in its operation so as to prevent practice by felons who had been convicted before passage of this Act. Their arguments leave no doubt as to this branch of the case.

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In the Appellate Division of the New York Supreme Court no discussion whatever was made on this point. In the Court of Appeals it was argued at length that it was the clear legislative intention to prohibit the practice of medicine by any person who, previous to the passage of the Law, had been convicted of felony.

See Opinion, Haight, J., 152, N. Y., at p. 239.

Thus it is obvious that the present Medical Law plainly forbids practice by felons. In section 140 it plainly says that they shall not practice, and in section 153 it adds a penalty for such practice by declaring the practitioner to be guilty of a misdemeanor.

It might be argued that the Legislature had no constitutional **power** to deny to a man who had been already convicted, the right to practice medicine; but it is plain that it was **its clear intention so to do.**

POINT II.

The general scope of the argument outlined.

It may be succinctly stated that the dispute between the respective parties to this controversy is as follows:

The defendant, upon his part, claims that his conviction under the act in question would **add a new punishment**—viz., the deprivation of his right to practice medicine—to the punishment already suffered by him for the felony which he committed. He, therefore, claims the law is **unconstitutional,** either as *ex post facto* or as in the nature of a bill of attainder.

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The People, upon the other hand, claim that the only question involved is that of the **admitted power of the State to regulate the practice of medicine.** They claim that the exclusion of Hawker, as an unfit person, whose bad character has been adjudicated by a conviction of felony, is plainly within the **reserved police power** of the State.

In connection with this contention they further claim that if Hawker, the defendant, is deprived of the privilege of practicing medicine under the New York Statute, his position is exactly like the position of any person upon whom a public health law operates. He must yield, in view of the greater benefit to be gained by the public at large. His personal inconvenience is a mere incident, and **the purpose of the legislation was in no wise to punish him; and, therefore,** in no sense *ex post facto.*

POINT III.

The police power extends to the protection of the public health, and comprises the regulation of the practice of medicine.

That the police power extends to the protection of the **public health** is elementary.

> Am. and Eng. Ency. of Law, vol. 18, p. 748 and cases cited.

As a corollary of this the State has the right to pass laws regulating **the practice of medicine.**

> Am. and Eng. Enc. of Law, vol. 18, p. 748.

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Citing—

Orr *vs.* Meek, 111 Ind., 40.
Dent *vs.* W. Va., 129 U. S., 114.
Eastman *vs.* State, 109 Ind., 278.
Richardson *vs.* State, 47 Ark., 572.

There is no dispute about these general propositions. The only question is as to their **application** to the peculiar facts of the case at bar.

The People contend that they necessarily give to the State the right to determine who, **in point of character,** is a fit person to be permitted to practice; and that in the proper exercise of this right the State has the power to exclude from practice **any person whose character is admittedly or adjudicatedly bad.**

POINT IV.

The cardinal cases on both sides at once reviewed.

The defendant bases his entire argument upon the **alleged deprivation** of his right to practice, and claims that this so called deprivation was a **new punishment.**

In support of this view he cites the celebrated "test-oath" cases of **Cummings** and **Garland,** and relies almost entirely upon them.

The People, upon their part, claim that these cases have no bearing upon the issues, and to substantiate this adduce the **Dent** case (129 U. S., 114). In that case the Court held that the State of West Virginia had the right, in the exercise of its admitted police power, to exclude a doctor and **stop his actual practice** because he did not come up to new **educational requirements exacted by the State.**

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Here it is claimed that, in the exercise of the same police power, the State of New York, has the power to exclude Hawker because he does not come up to the **moral character requirement** exacted by the State.

These cases are of such vital importance that they are quoted at length, particular attention being given to make the quotations accurate.

Cummings vs. State of Missouri, 4 Wall 277

Cummings, a Roman Catholic clergyman, at the close of the war could not take **a test oath** to the effect that he had not sympathized with the South during the Rebellion. The Constitution of Missouri denied to those who could not take the test oath the right to follow any profession, and Cummings was prosecuted for misdemeanor for pursuing his pro fession—namely, that of a clergyman—not having taken the test oath. His claim was that the Constitution, as far as it imposed such a test oath, was unconstitutional and void.

The Court held that the oath was *void*, stating its reasons as follows:

Per Field, *J.:*

1. The test oath was retrospective and embraced all **the past** (p. 318).

2. The question is not as to the existence of the police power, **but whether that power has been made an instrument for the infliction of punishment** (p. 319).

3. Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession (p. 319).

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4. The alleged qualification **"bore no possible relation"** to Cummings' fitness for his profession (p. 319).

5. The disability created constituted punishment (p. 320).

6. The deprivation of any rights, civil or political, may be punishment, the circumstances attending and the causes of the deprivation determining this fact (p. 320).

7. The test oath was aimed **at past acts, and not future acts** (p. 327).

Ex parte Garland, 4 Wall, 333.

This case is exactly similar to the case of Cummings, and also related to **a test oath,** and only differed in the circumstances that the defendant was an attorney in the United States Courts, and the law in question was an act of Congress.

Per Field, *J.*:

1. The clauses of the test oath "all relate to **past acts"** (p. 376).

2. The statute is directed against parties who **have offended** (p. 377).

3. Its object is to exclude them from the practice of the law in the United States Courts (p. 377).

4. The profession of an attorney and counselor is not like an office created by an act of Congress, which depends for its continuance, its powers and its emoluments upon the will of its creator (p. 378).

5. The attorney is not an officer of the United States, but of the Court (p. 378).

6. The pardon blotted out his guilt (pp. 380–1).

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It is of the utmost interest to note that in both of these cases the Supreme Court decided by a five to four vote—a bare majority of one. The Court seems to have leaned strongly toward the view that the States possessed reserved rights to regulate these professions; but the hardship of each case seems to have resulted in a decision adverse to the State. Both cases proceeded upon the principle that a test oath **for past conduct** alone could in no wise be considered the imposition of a valid qualification within the power of the State to impose; and that it must be regarded solely **as punishment for past conduct**.

Twenty years later, when the passions aroused by the war had died away, similar questions arose again in the Dent case, 129 U. S., 114.

Dent vs. State of W. Va., 129 U. S., 114:

In that case the State of West Virginia passed a law requiring all practitioners of medicine either (1) to possess a certain diploma, or (2) to have actually practiced ten years. Dent, who had no diploma and who had actually practiced **only five years,** was convicted of a misdemeanor for so practicing after the passage of the act.

We present the salient features of this case in the belief that it is **directly decisive** of the case before the Court.

The Supreme Court approached the question squarely, holding as follows:

Per FIELD, *J.:*

1. (Defendant **claims**) "the denial of the right to practice his profession without the certificate required constituted the deprivation of his

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vested right and estate in his profession, which he had previously acquired (p. 121).

2. Freedom to follow professions, etc., laid down (p. 121).

3. But there is **no arbitrary deprivation** of such right where its exercise is not permitted because of **a failure to comply with conditions imposed by the State for the protection of society.** The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of **ignorance or incapacity as well as of deception and fraud** (p. 122).

4. The nature and extent of the qualifications required must depend primarily **upon the judgment of the State** as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. **It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation** (p. 122).

5. Due consideration therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, **may call for further conditions** (p. 123).

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6. We perceive **nothing** in the statute **which indicates an intention** of the Legislature **to deprive one of any of his rights. No one has a right to practice medicine** without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill (p. 123).

7. The cases of Cummings *vs.* The State of Missouri, 4 Wall, 277, and of *ex porte* Garland, 4 Wall, 333, upon which such reliance is placed, do not, in our judgment, support the contention of the plaintiff in error (setting out both cases at length). There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine, that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. **Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance.** The Constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their profession. **The law of West Virginia was intended to secure such**

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> **skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State** (pp. 125, 128).

The object of setting these three cases out so fully is to bring plainly before the Court the true principle which underlies them: **The State has a right to regulate, but not to impose arbitrary qualifications under the name of regulations.**

Such an arbitrary qualification having no relation to the profession would be pure and simple punishment.

If it had a valid relation to the profession the professional man would have to bow to it.

Under the circumstances, then, the broad question which it is the object of this brief to discuss, is now brought into prominence. It amounts to this: **Is good moral character a just and proper qualification to require of a physician? A** large portion of this brief will be devoted to showing how good moral character is made a requisite in a physician both by the laws of New York and also by the laws of dozens of other States.

The obvious purpose will be to show that good, moral character **has always been, and now is, a qualification** of physicians generally recognized and enforced.

This will bring the proposition directly into line with the case of Dent *vs.* West Virginia, just recited, and effectually determine the constitutionality of the New York statute in relation to the defendant Hawker.

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POINT V.

Historical View of the regulation of the practice of medicine in New York.

As the fundamental question in this case turns upon the right of the State of New York to regulate the practice of medicine, it is important to note that **the State has undertaken to regulate this practice from the earliest times.**

In Board of Excise *vs.* Barrie, 34 N. Y., 662, the Court said with regard to excise laws:

> "These appeals challenge legislative authority exercised since the origin of the government. At no time in the history of the State have we been without excise laws, nor has the authority of the Legislature to control, regulate, or prohibit the sale of spirituous and intoxicating liquors ever been questioned."

The same remark, *mutatis mutandis*, might be made as to medical legislation, and we present a skeleton resume of the various acts by which the Legislature has controlled the practice for 140 years.

Before 1806.

Chapter CXCVIII., Laws 1760, applying only to the City of New York, superseded by chapter XXXVIII., Laws 1792. In 1797 the first general regulation of medicine throughout the State was passed, known as chapter XLV., Laws 1797, succeeded by chapter CXXXVII., Laws 1801, requiring all persons to register with the County Clerk.

Between 1806 and 1844.

By chapter CXXXVIII., Laws 1806, an entirely new departure was made and medical societies were created

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"for the purpose of regulating the practice of physic and surgery in this State."

With slight amendments this law was adopted in the Revised Laws of 1813, and afterward in the Revised Statutes of 1830.

From 1844 to 1874.

By chapter 275, Laws 1844, every regulation of medicine was abrogated, and for thirty years practitioners were practically free from any regulation whatever.

From 1874 to date.

These statutes regulating the practice of medicine were re-enacted and altered from time to time, until the present condition of affairs was reached.

These statutes were: Chapter 436, Laws 1874; Chapter 513, Laws 1880; Chapter 647, Laws 1887; Chapter 661, Laws 1893, which last-mentioned law is the present "Public Health Law."

Chapter 398, Laws 1895, which amended section 153 of the "Public Health Law," is the act under which this defendant is prosecuted.

POINT VI.

Good moral character requirement in New York.

The specific object of this topic is to trace the gradual development of the present system which embodies the necessity for **good moral character** in practitioners.

Before the year 1890 any person who either had a diploma from any chartered medical school or State Board of Examiners or Medical Society was, in effect, licensed to practise medicine in the State of New York.

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Under chapter 513 of the Laws of 1880, the degree of doctor of medicine legally conferred by any incorporated medical college in New York was declared to be a license to practice after the holder had registered it.

Under this same chapter the holder, if coming to the State **from without the State,** was obliged to get his diploma indorsed by the faculty of some incorporated medical college or medical school of this State, after which indorsement it became as much a license as if it had been issued by the school indorsing it.

See chap. 513, L. 1880, sec. 4.

Here we see the first requirement of good moral character; for an outsider coming to this State before he could get his diploma indorsed, was obliged to exhibit

" satisfactory evidence of his good moral character."

The inference is that the State regarded graduates of its own chartered medical schools as of sufficiently good moral character without other proof.

This condition of affairs continued substantially unchanged until 1890, when the radical change which gives to the present system its character, was inaugurated by chapters 500 and 507, Laws 1890.

By chapter 500, Laws 1890, the Regents of the University of the State of New York, who are a governmental organization, were granted the right to indorse foreign diplomas.

By the second act, chapter 507, Laws 1890, "An Act to establish Boards of Medical Examiners," the Regents of the University were made the sole source from which licenses could for the future issue.

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The new and comprehensive system which came into effect, as a result of this act, was to take effect upon September 1, 1891, and had the effect of compelling candidates desirous to become practitioners of medicine to stand a State examination before State examiners, upon the successful passage of which examination the candidate would receive a license from the Regents to practise medicine.

One of the requirements of any person who comes up for examination is that he shall be

"of good moral character."

(See ch. 507, L. 1890, sec. 8.)

These provisions of this Law of 1890 were carried into the present Public Health Law, chapter 661, Laws of 1893; and as far as they required an applicant for license to practise medicine to be **"of good moral character"** they are preserved in the present act which regulates the licensing of medical practitioners.

So far none of the express requirements of good moral character had been made by the Legislature to relate in any way to **existing practitioners.** As far as the State has attempted to deny to those who are not of good moral character any existing privilege to practice medicine its regulations are as follows:

By laws of 1887, chapter 647, section 6, no person who had been convicted of a felony could be licensed, and if any person who was duly licensed should be convicted of a felony his license should be revoked and his practice of medicine thereafter would be a misdemeanor.

This provision was substantially embodied in the revision of 1893, chapter 661, Laws 1893, and was preserved in the present law, chapter 398, Laws 1895.

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This last named section is the one under which the prosecution in this case has been brought.

Thus in New York candidates are required not only to pass through medical schools, whose standards are carefully arranged, but likewise to pass the State examination; and before they can stand this State examination they are required to exhibit to the Regent satisfactory evidence of their **good moral character.**

It may also be added that under the present medical law, chapter 661, Laws 1893, section 140, the right is reserved to the Regents of the University to revoke the license of any person upon the recommendation of a State Board of Medical Examiners.

By all these various provisions **good moral character is made a salient requirement.**

Had such legislation stopped at the point of merely requiring **future applicants** to be of good moral character, it is obvious that the requirement would only have been partial.

No such reproach, however, can attach to the law of New York.

By the provisions of Laws 1887 and Laws 1893, as cited above, the authority of the State to practice medicine was thenceforward intended to be withdrawn from those who had been convicted of a felony by any court of competent jurisdiction.

No arbitrary distinction was made. Those who by their own voluntary act had been convicted of felony and had been adjudicated of **bad moral character and as unworthy of public confidence** were simply thenceforward denied the right to practice medicine; and thus by fair and equal tests all

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persons who were permitted to practice were required to possess such **good moral character** as would justify the State in extending them the great privilege and license which they sought to enjoy.

POINT VI.

A general review of the statutes regulating the practice of medicine.

Having reviewed New York legislation, we now present at considerable length a general review of the statutes of other sovereignties regulating the practice of medicine, so far as they have reference to the qualification of **good moral character.**

These statutes, of course, widely differ in details. Many men are of many minds; and the same is true of many sovereign powers when legislating upon the same topic. There is, however, a peculiar weight of legislation in which good moral character is recognized as **essential to a physician.** The statutes which we cite comprehend a large majority of the States in the Union. They comprehend Great Britain and Ireland, and nearly all the British Colonies in North America, and take in, at a hazard, such distant regions as New Zealand, St. Lucia and Hawaii.

Indeed, it would seem that the requirement that a physician should be of good moral character was **almost a fundamental requisite** in English-speaking lands.

It will be understood that the following selections are intentionally fragmentary. Otherwise they would take up too much space. It is believed, however, that they are correct and that they will reflect intelligently the meaning of the respective legislatures.

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By way of introduction it is interesting to note that in two of the States the Constitution provides for the regulation of the practice of medicine; thus incorporating this subject into the fundamental law.

Louisiana: Cons. 1879, art 178.
Texas: Cons. 1876, art. XIV, sec. 31 in part.

We pass next to the States in which "good moral character" is simply in terms required without further elaboration:

Alabama—Code 1887, secs. 1297, 1304.
Arkansas—Act 14, 1893, sec. 2.
Kansas—Gen. Stats., 1889, sec. 2450.
Maryland—Act of 1892, chap. 296.
Massachusetts—Act 1894, chap. 459.
Ohio—S. & B.'s Rev. S. of 1890, sec. 4403.
Pennsylvania—Act May 18, 1893, sec. 13.
South Carolina—Act 1890, chap. 454, sec. 2.

Slight variations upon this general theme are found:

In Kentucky—Where the applicant must be "reputable."

In Tennessee—Where he must be "worthy and competent" (Act 1889, chap. 178, sec. 3, as amended Act 1891, chap. 109, sec. 2).

In Maine—Where he must be of "good moral character." unless he has a diploma. R. S. 1883, chap. 13, sec. 9.

In Mississippi—Where he must be of "good moral character, and state references as to his personal character." Code 1892, secs. 3244-5.

In South Dakota—Where he must be of "good moral character and not an habitual drunkard" (Act February 16. 1893, sec. 5).

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In Oklahoma—Comp. Stats. 1893, sec. 352 (same as South Dakota).

In Kansas—"Certificate * * * issued to any reputable physician who is practicing, or who desires to begin to practice, who possesses a diploma." Act 1893, Apr. 10, § 2.

Slightly more elaborate regulations are required of which the California statute is a model:

California—Certificate refused to individuals guilty of unprofessional conduct or revoked after opportunity to be heard.

Act '75-76, chap. 518, as amended Act 1877-78, chap. 576.

For provisions essentially similar to this, see:

Illinois—Laws 1887, p. 225, sec. 1.
Kansas—Act 1893, April 10, sec. 5.
Minnesota—Act 1887, chap. 9, sec. 3.
Missouri—Rev. Stats. 1889, sec. 6871.
West Virginia—Code of West Virginia, 1890, chap. 150, sec. 10.
Nebraska—Act of 1891, chap. 35, sec. 14.
Oregon—Act of February 28, 1889, sec. 9.
Montana—Act of February 28, 1889, sec. 4.
Utah—Act of 1892, chap. 72, sec. 8.
New Mexico—Comp. Laws 1884, sec. 2562.
North Carolina—Code 1883, sec. 3133.
South Dakota—Act of February 16, 1893, sec. 6.

The following statutes bring the question of moral character more specifically into view and are grouped for that reason. Particular stress is laid upon this group for the reason that it indicates the legislative

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feeling as to **the bearing of a conviction for crime upon the general question of moral character.**

Colorado—The board may refuse certificates to persons convicted of conduct of a criminal nature; and may revoke certificates for like cause. Mills, Ann. Stats., 1891, sec. 3556.

Iowa—May revoke a certificate to a person who has been convicted of felony committed in the practice of his profession, or in connection therewith; or may revoke for like cause; * * * and such refusal or revocation prohibits such person from practicing medicine, surgery or obstetrics. Laws 1889, chap. 104, sec. 7.

Louisiana—The board is required to strike from the said list (of registered names) the names of persons convicted of any infamous crimes by any court * * * whether prior or posterior to registration. Act 1882, No. 31, sec. 5.

New Jersey—May refuse or revoke a license for chronic and permanent inebriety, the practice of criminal abortion, conviction of a crime involving moral turpitude, or for publicly advertising special ability to treat or cure disease which, in the opinion of the board, it is impossible to cure (after hearing). Act 1890, chap. 190, sec. 5.

North Dakota—Substantially the same. Act 1890, chap. 93, sec. 3.

Vermont—May revoke or annul a certificate if in their judgment the holder has obtained it fraudulently or has **forfeited his right to public confidence** by the conviction of a crime. Rev. Laws 1880, sec. 3915.

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Washington—The board will refuse or revoke a license for unprofessional or dishonorable conduct subject to the right of appeal. * * * "Unprofessional or dishonorable conduct" means procuring or aiding or abetting in a criminal abortion or employing what are popularly known as cappers or steerers; or obtaining any fee on the assurance that any manifestly incurable disease can be permanently cured; or willfully betraying a professional secret; or advertisments of medical business in which untruthful or improbable statements are made; or advertising any medicine or means whereby the monthly periods of women can be regulated, or the menses reestablished if suppressed; or the conviction of any offence involving moral turpitude: or habitual intemperance. Act March 28, 1890, secs. 3 and 4.

It will be observed from the foregoing review that in the United States, by an overwhelming amount of legislation, good moral character is made essential to a physician. In an excursion now to be taken throughout the British Dominions it will be seen that England and her colonies have been even more rigid in their legislation. In fact, in the most summary fashion, bad character, whether evidenced by conviction or not, has been made the means of disqualification of a medical practitioner.

Great Britain and Ireland—If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offense, or shall be, after due inquiry, judged by the general council to have been guilty of infamous conduct in any professional

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respect, the general council may, if they see fit, direct the register to erase the name of such medical practitioner from the register. Acts 21 and 22 Vict., chap 90, sec. 29.

New Brunswick — Substantially same. Act 1881, chap. 19, sec 22.

Northwest Territory—Substantially same. Ord. 5. 1888, sec. 37, as substitued by Ord. 24, 1892, sec. 1.

Substantially same, Nova Scotia. R. S. 5th ser., chap. 24, sec. 19.

Manitoba—Any registered medical practitioner convicted of felony or misdemeaner before or after the passage of this act or his registration forfeits his rights to registration, and by direction of the council his name shall be erased. If a person known to have been convicted of felony or misdemeanor presents himself for registration, the register may refuse registration. If any person registered be judged after due inquiry * * * to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the register to erase his name. Rev. Stats. of Manitoba, 1891, chap. 98, sec. 40.

British Columbia—Any registered practitioner convicted of any felony thereby forfeits his right to registration and * * * his name is required to be erased from the register ; or in case a person known to be convicted of felony presents himself for registration, the register has the power to refuse such registration. Cons. Act, 1888, chap. 81, sec. 32. Substantially same as to Quebec. R. S. 1888, sec. 3996.

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Ontario—A practitioner is liable to have his name erased from the register where he has been convicted before or after registration of an offence which, if committed in Canada, would be a felony or misdemeanor, or where he has been guilty of any infamous or disgraceful conduct in a professional respect. Rev. Stats. 1887, chap. 148, sec. 34.

Newfoundland—The * * * board may try and expel any member of the profession for acts of malpractice, misconduct or immoral habits * * * Act. 1893, chap. 12, sec. 32.

Prince Edward's Island—A medical practitioner guilty of infamous or disgraceful conduct in a professional respect, is liable to have his name erased, and if he apply for registration, the council may refuse it. Act 1892, chap. 42, sec. 22.

We now add some selections from the laws of New Zealand, St. Lucia and Hawaii, and leave this immediate subject. Counsel would state that the foregoing statutes do not pretend to exhaust all the statutes. For example, no examination whatever has been made of any French, Italian, German or other laws. Merely English-speaking countries have been looked into, and those not exhaustively.

There can be no question whatever as to the existence of **the fact, which it is sought hereby to prove,** namely, that English-speaking races have considered **good moral character to be an essential qualification of a physician.**

New Zealand—If any registered person shall be or shall have been convicted of any felony or misdemeanor in Great Britain or Ireland, or in any of the British Dominions, the

Register-General and Register respectively shall erase the name of any such person from the register, and such erasure shall be notified by the Register-General in the "New Zealand Gazette." Medical Practitioner's Act, 1869, No. 51.

Hawaii—It shall not be lawful for any person to practice in this kingdom as a physician or surgeon for compensation or reward unless he shall have first presented to the Board of Health satisfactory evidence of his professional qualifications and good moral char acter. Act 1876, chap. XI., sec. 3.

St. Lucia—If any registered medical practitioner is convicted of any felony, the register shall erase the name of such practitioner from the Medical Register.

If any registered medical practitioner is convicted of any misdemeanor, a report shall be submitted * * * to the Governor-in council, who * * * shall determine whether (he) has been guilty of infamous conduct in any professional or other respect, and may thereupon, if he sees fit, direct the register to erase the name * * * Medical Practitioner Ordinance, No. 77, of 1885, sec. 11.

POINT VII.

Adjudications as to good moral character.

We have reviewed in preceding points, first, the statutes of the State of New York requiring good moral character in practitioners; secondly, the statutes of other sovereignties requiring such character.

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The matter has not often been before the courts for adjudication, but in several cases they have held either directly in terms, or in general language, that the statutes regulating the practice of medicine are designed to secure good moral character.

Reference, by the way, is made to the opinions of the courts below in this case. In the Court of Appeals the opinion of Judge Haight (152 N. Y. 242) describes at lenghth the trust which is placed in a physician, and argues the necessity of good moral character.

In the prevailing opinion of Patterson, J., in the Appellate Division, it is taken for granted that the State has the right to exact good character. The Court expressly held the statute constitutional as to future felonies; and thus by necessary implication determined that good moral character is an essential qualification (see 14, App. Div. 190–1, Transcript of Record pp. 17 and 20).

In the dissenting opinion, Ingraham, J. argues strongly:

> "That the character of a physician is an important element in determining whether he possesses the necessary qualifications for the practice of his profession." (See 14 App. Div. 195; Transcript of Record p. 21).

Passing to other adjudications, we find that they flatly hold that good character is essential.

State v. State Board, 32 Minn. 324.

Per Dickinson, *J.*:

> "But the Legislature has surely the **same power** to require, as a condition of the right to practice this profession, that the practitioner

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shall be possessed of the qualifications of **honor and good moral character,** as it has to require that he shall be **learned** in the profession. It cannot be doubted that the Legislature has authority in the exercise of its general police power to make such reasonable requirements as may be calculated to bar from admission to his profession dishonorable men, whose principles or practices are such as to render them **unfit to be trusted** with the discharge of duties."

Thompson v. Hagen, 25 Maine 104.

Per Tenney, *J.:*

"—— its authors were careful that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. It could not have been intended that persons destitute of the **moral qualifications** required should have full opportunity to enter professionally the families of the worthy but unsuspecting and be admitted to the secrets which the sick chamber must often entrust to them."

State v. Hathaway 115 Mo. 36.

Per Gantt, *J.:*

"The Legislature then, in the interest of society and to prevent the imposition of quacks, adventurers and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the State permits to practice medicine. And the objection now made that because the law rests in this board the power to examine not only into the literary and technical acquirements of the applicant,

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but also into **his moral character,** it is a grant of judicial power, is without force."

Eastman *v.* State 109, Ind. 278.

Per Elliott, *C. J.:*

"It is, no one can doubt, of high importance to the community that health, life and limb should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the Legislature to enact such laws as will protect the people from ignorant pretenders and secure the services of **reputable,** skilled and learned men."

Within the last few days the latest decision upon this subject has been handed down by the Supreme Court of North Carolina—as recently as Dec. 23d, 1897.

State v. Call (N. Car.) 28 S. E. Rep. 517.

Per Clark, *J.:*

"To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly of special privilege. The door stands open to all who possess the requisite age **and good character,** and can stand the examination which is exacted of all applicants alike."

This doctrine, however, seems to have been amply stated by the Supreme Court itself in the Dent case, which is made substantially the foundation stone of the entire argument.

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In that case Mr. Justice Field held that the State had the right to

> "prescribe all such regulations as, in its judgment, will secure or tend to secure (its people) against the consequences of ignorance or incapacity, as well as **deception and fraud"** (in physicians) (p. 122).

Dent v. W. Va. 129, U. S. 114,

POINT VIII.

Conviction of a felony is proof of bad moral character.

It hardly seems possible that this proposition requires argument.

Nevertheless, the Appellate Division, in reversing the conviction herein, took the position that a conviction of a felony was at best only presumptive proof of bad character.

> "Conviction of a felony certainly raises a presumption of bad character, but it is not an irrebutable presumption that a man convicted of an infamous crime, "treason, felony or the *crimen falsi*," ten or twenty or fifty years ago is to-day absolutely an immoral person, unfit to practice any profession. There is no such conclusive presumption. Even as to the competency of witnesses, the old rule of disqualification of convicts is completely done away with in the State of New York. (Code Civ. Proc. Sec. 832). The provision of the statute we are now considering does not take hold of an existing condition of moral character. That may be never so good, and yet the new crime exists, arising exclusively out of a past transgression."

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See 14 App. Div. p. 192, per Patterson, *J.*, in Transcript of Record p. 19.

The Court of Appeals in its opinion reversing this judgment, refers to this matter as follows:

> One of the conditions imposed upon persons who seek to practice medicine is that they shall possess a good moral character. (See 145). The presumption of bad character attaches to a person convicted of a felony.

See 152 N. Y. 243, per Haight, *J.*

At common law conviction of felony made a man infamous; disqualified him as a witness: excluded him from jury services;

See Amer. and Eng. Ency., Infamy, vol. 10, page 604.

worked corruption of blood and forfeiture of estates;

Bouvier Law Dict. "Felony";

forfeited all offices, at least all public offices.

Minors Insti., vol. 2, page 33.

Knowing what we do of the history of the old criminal law, we know that the convicted felon was usually quickly put to death, and thus all his rights, personal, relative, civil and political were utterly extinguished.

One hundred years ago the defendant Hawker, for the crime he has committed, would, on conviction, have been sentenced to death, and no question would ever have arisen as to whether the State had any right to deny him the further privilege of practicing medicine.

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In modern times, however, the ancient rigor of the common law has been much modified. In New York, for example, a defendant is not incompetent as a witness, although his conviction may be proved to discredit him.

Penal Code, sec. 714.

As we understand he is incompetent as a juror; he is not allowed to vote: he cannot hold any public office; he cannot engage in the liquor traffic; he is forbidden to practice medicine.

N. Y. Const., Art. 2, Sec. 2; Laws, 1896, Chap. 909, Sec. 11; Laws, 1896, Chap. 112, Sec. 23; N. Y. Mil. Code, Art. 1, Sec. 2; Laws, 1893, Chap. 661, Sec. 162; Laws, 1896, Chap. 840, Sec. 2; N. Y. Code Crim. Proced., Sec. 375.

It would doubtless be possible to write many pages upon this subject.

The general principle of law is well founded that conviction of felony stamps an individual as **thoroughly untrustworthy and as of bad moral character.**

In the analogous case of an attorney-at-law, the U. S. Supreme Court has recognized the common law doctrine that a conviction of felony makes him infamous and unfit to continue a member of the profession.

Ex parte Wall, 107 U. S. 265, 1882.

Per Bradley, *J.*:

> "If regularly convicted of a felony an attorney will be struck from the roll as of course whatever the felony may be, because he is rendered infamous. Where an attorney was convicted of theft and the crime was condoned

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by burning in the hand, he was nevertheless struck from the roll."

* * * * * *

"The question is," said Lord Mansfield, "whether after the conduct of this man it is proper that he should continue a member of a profession which should stand free from all suspicion. **It is not by way of punishment; but the Courts in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not."** (Citing 1 Tidds Prac. 89).

Similarly in Percy's case 35 N. Y. 651, the Court held that where an attorney was of bad moral character the Court had **"the power to protect the public"** by preventing him from practicing.

It is obvious that the criticism of Mr. Justice Patterson merely attacks the **propriety of the test** established by the legislature.

But in the language of the Dent case:

"The nature and extent of the qualifications required must depend **primarily upon the judgment of the State** as to their necessity."

Dent *vs.* W. Va., 129 U. S., at p. 122.

It has been repeatedly held that if the legislation is calculated, intended convenient and appropriate to accomplish the good of protecting the public health and of serving the public comfort and safety the exercise of the legislative discretion is not the subject of judicial review.

People *vs.* Gillson, 109 N. Y. 389.
People *vs.* King, 110 N. Y. 418.
People *vs.* Ewer, 141 N. Y. 129.

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People *vs.* Warden, 144 N. Y. 529.
People *vs.* Havnor, 149 N. Y. 195.

The test imposed must in its very nature be arbitrary in the sense of being fixed. The necessity of arbitrary determination of the qualification of physicians has been fully recognized and sustained.

Ex parte Spinney, 10 Nev. 323.
Hewitt *vs.* Chavier, 16 Pick. 353.
People *vs.* Philbin, 70 Mich.

See generally as to the propriety of an arbitary test.

People *vs.* Cipperly, 37 Hun, 319, dissenting opinion of Leonard, *J.*, which was adopted as the opinion of the Court of Appeals, 101 N. Y. 634.

The power of the Legislature to establish an arbitrary test has been fully justfied by this Court. Per White, *J.:*

> "It was obviously the province of the State Legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumption is after all but an illustration of the power to classify."

Jones v. Brim, 165 U. S., 180 at page 183

One case, Bradwell v. State, 16 Wall, 130, is immediately pertinent: A woman was refused a license to practice law on the ground of her sex, she being otherwise qualified.

Per Bradley, *J.:*

> "It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are **exceptions to the gen-**

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eral rule. The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

* * *

In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is **the prerogative of the legislator** to prescribe regulations founded on nature, reason and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny and mission of women, it is within the province of the Legislature to ordain what offices, positions and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that the decision and firmness which are presumed to predominate in the sterner sex."

This Bradwell case was followed and approved. *In re* Lockwood, 154 U. S. 116.

The New York Legislature, within this Bradwell case, has merely recognized a fact which centuries of **"nature, reason and experience"** had determined—namely, that the conviction of a felony deprives the convict of the right to public confidence. It would seem, therefore, that their act in denying to such persons the right to practice medicine, instead of being an arbitrary, unsustainable proceeding, was the exercise of a wise discrimination in the matter of law making.

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POINT IX.

A physician's right to practice is a mere license; analogy of a druggist's, an attorney's, and a liquor license.

We have the weight of Judge Cooley's eminent authority to the effect that a practitioner of medicine is merely a licensee:

> "And some employments in which integrity is of vital importace it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are **not reputable**" (referring to the practice of medicine as one of these employments).

Cooley's Cons. Lim., 6th ed., p. 745.

This proposition that the physician is a **licensee** is taken for granted in all the cases in which the right of the State to regulate the practice has been sustained.

The position taken by this court in the Dent case is inconsistent with any other theory.

> "**No one has a right to practice medicine** without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering his services as a physician, that he possess such learning and skill" (p. 123).

Dent v. W. Va., 129, U. S., 114.

No question relating to character was then before the court, and hence that qualification was not touched upon.

The law of taxation, however, throws a clear light upon the subject. The practice of medicine

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has been subject to an occupation tax (Am. and Eng. Encly. Taxation, vol. 25, page 486).

See also Ohio v. Proudfit, 3 Ohio, 63, when a **license tax** on a physician was sustained without opinion, and likewise a license tax on an attorney (Ohio v. Hibbard, 3 Ohio, 63).

Afterwards, and in Ohio v. Gazley, 5 Ohio 14, the court was asked to reconsider its decision in the Hibbard and Proudfit cases, but declined.

In describing the physician's (as well as the lawyer's) status, they said:

Per Lane, *J*:

> It is said a license to practice is a contract, and that a tax upon such as are licensed is a violation of the contract. **We cannot consider the license in this light.** Although the effect of the license gives to the members of these professions something of an exclusive character, and incidentally confers valuable privileges, yet the design of the license is to protect the community from the consequences of a want of professional qualifications, and to benefit the public by enabling the profession to acquire professional merits, consequently the **license cannot be holden to confer any vested privileges, but is liable to be modified in any manner which the public welfare may demand.**

The position of a druggist is plainly similar to that of a physician in the relation borne to the police power.

In the case of a druggist this Court has recently held that his license is subject to modification, and

that if his license is modified by general law he cannot be heard to complain.

Gray v. Conn., 159 U. S. 76.

The position of an attorney-at-law is precisely analogous

Bradwell *vs.* State, 16 Wall, 130, and see the license tax cases.
Simmons *vs.* State, 12 Mo. 268.
Young *vs.* Thomas, 17 Fla. 169.
Languille *vs.* State, 4 Tex. App., 312.
Ohio *vs.* Hibbard, 3 Ohio, 63.
Ohio *vs.* Gazlay, 5 Ohio, 14.

In the similar case of a liquor dealer, whose right is a license from the State, an interesting Court of Appeals case is immediately in point and shows the inalienable right of the State to control the privilege.

Board of Excise Commissioners *vs.* Barrie, 34 N. Y., 657.

Per Wright, *J.:*

> "A State is not sovereign without the power to regulate all its internal commerce as well as police. The Legislature exercises and wields these sovereign police powers as it deems the public good to require.
>
> * * * * * *
>
> It, in terms, it is true, **revokes licenses** granted under the Act of 1857, but that is **no encroachment** upon any right secured to the citizen as inviolable by the fundamental law. These licenses to sell liquors are **not contracts** between the State and the persons licensed, giving the latter vested rights, protected, on

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> general principles, and by the Constitution of the United States, against subsequent legislation: nor are they property, in any legal or constitutional sense. **They have neither the qualities of a contract or of property but are merely temporary permits to do what otherwise would be an offense against a general law.** They form a portion of the internal police system of the State; are issued in the exercise of its police powers, and are subject to the direction of the State Government, which may modify, revoke or continue them as it may deem fit."

It thus appears that the relation of a physician to his sovereignty is that of **licensee and licensor.** If this is not the relation, then it is obvious that the whole possibility of police control over the practice of medicine disappears instantaneously.

In the case of the control of liquor traffic the State has the right to stop it altogether, for thereby the public good may be consulted. In the case of the regulation of medicine, however, no such absurd regulation could be made, nor is it at all necessary that the control over such callings should comprehend the power of destroying it.

It must follow, however, that if **an individual practitioner** is deficient in the matter either of learning **or of proper character,** then the power of the State is sufficient to disqualify him from practicing for the general good.

There is a vast and obvious distinction between the power to stop an unfit individual and the power to prohibit the entire practice.

One would be reasonable; the other would be unreasonable.

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POINT X.

The exaction of a new requirement as to character in physicians deprives Hawker of no vested right.

We would preface this point by noting that the argument now proceeds upon the following assumptions:

1. That good moral character is a proper requisite in physicians.

2. That conviction of felony is a sufficient test of good moral character.

3. That a physician's status is that of a license.

The essential character of a license is that of a permit to do what otherwise would be an offence against the general law. Regarding, then, a physician's status as that of a licensee it is obvious that there is no distinction between the granting of a license in the first instance and its subsequent control by the Legislature for the general good.

Thus, in the case of a **physician,** it was held that his license was not property in such a sense that it could not be revoked for bad character; that the original right to grant and the reserved right to revoke, stand on the same footing.

> State (Chapman) v. State Board, 34 Minn., 387.

Relator claimed that his license when once granted, was **property** (389). That it could not be revoked by an executive board:

Per Mitchell, *J.:*

> "There is no possible distinction in this respect between refusing to grant a license and

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revoking one already granted. **Both acts are an exercise of the police power.** The power exercised and the object of its exercise is in each case identical, viz.: **to exclude an incompetent or unworthy person** from this employment. Therefore, the same body which may be vested with the power to grant, or refuse to grant, a license, may also be vested with the power to revoke." (390.)

The **Dent** case, which has been so often and so extensively quoted, fully establishes this doctrine, viz.: That by the imposition of new conditions the Legislature has the power **to destroy an existing license and oust an existing practitioner,** just as Dent himself was ousted.

In a recent decision this Court has re-affirmed this doctrine most luminously.

By a Connecticut statute, previous to 1890, a druggist could obtain a license to sell liquor in a certain way; but, by Sections 3087 and 3067, Conn. Rev. Stats., passed in 1890, an additional requirement was made.

The druggist, Gray, persisted under his original license and did not comply with the new conditions. He was convicted and carried his case to the Supreme Court of the United States.

The Court decided the case in a brief opinion, citing nothing. It is patent that this decision is on all fours with the **Dent** case, and proceeds upon precisely the **same theory.**

Gray v. Connecticut, 159 U. S. 76-77.

Per Field, *J.*:

"A license to pursue any business or occupation from the governing authority of any municipality or State, can only be invoked for

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the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions.

* * * * * *

The responsibility of the legal authority, municipal or state, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the **subsequent exaction of further conditions,** which the lawful authority might deem necessary or useful.

For reasons which were deemed sufficient after 1890 by the authorities of Connecticut, the use of spirituous liquors in the preparation of pharmacists' compounds required still **further provisions than those previously existing."**

The right to stop an attorney for bad moral character is put on the **same ground.**

Percy's Case, 36 N. Y. 651.

Per Grover, *J.:*

"It had been seen that the right of admission to practice is made, both by the constitution and statute, to depend upon the possession of a **good moral character,** joined with the requisite learning and ability. It is equally important that this character should be preserved, after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to an office

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of a life tenure, while no provision for removal is made in case such a character is wholly lost (p. 654)."

The authorities are uniform in holding that legitimate exercise of the police power **deprives a person of nothing.**

Mugler *vs.* Kansas, 123 U. S., 643.

Here, by an act of Kansas in 1881, the liquor traffic was absolutely forbidden, and all buildings where liquors were manufactured, sold, etc., were declared to be **common nuisances,** and were directed to be abated.

Per Harlan, *J.:*

"The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants, the value of their property will be very materially diminished" (p. 657).

* * * "The acknowledged police power of a State extends often to the **destruction of property.** A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed" (p. 658).

* * * * * *

"Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace or security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the Government" (pp. 660–661).

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"It is true that when the defendants in these cases purchased or erected their breweries the laws of the State did not forbid the manufacture of intoxicating liquors. But the State **did not thereby give any assurance** or come under an obligation **that its legislation upon that subject would remain unchanged"** (669, citing Stone vs. Miss., 101 U. S., 816).

"If the public safety or the public morals require, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer" (p. 670, citing Beer Co. vs. Mass., 97 U. S., 32).

"We are unable to perceive anything in these regulations inconsistent with the constitutional guaranties of liberty and property. The State having the power to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific and mechanical purposes, we do not doubt her power to declare that any place kept and maintained for the illegal manufacture and sale of such liquors shall be deemed a common nuisance, and shall be abated, and at the same time to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender" (p. 671).

The rule is thus stated in a most recent case.

Per Harlan, *J.:*

"Uncompensated obedience to a regulation enacted for the public safety under the police

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power of the State is not taking or damaging without just compensation of private property, or of private property affected with a public interest."

Chicago. Burlington & R'd. v. Chicago, 166 U. S., 226 at page 225 (citing many cases).

Health Department vs. Rector, etc. 145 N. Y., 32.

Under section 663, New York Consolidated Act, certain improvements were directed to be made in tenement-houses. Certain penalties were sued for against Trinity Church, the owner of **existing tenements,** for failure to make them comply with the provisions of the law.

Per Peckham, *J.* (after generally discussing the police power):

"Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. * * * If [the defendant] suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure (p. 43).

"Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them and where such expense must be borne by them without any hearing or compensation because of the provisions of the law (27 Vt., 140). One of the late instances of this kind of legislation is to be

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found in the law regulating manufacturing establishments (Laws 87, chap. 462). The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting-shafts to be enclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire-escapes on the outside of certain factories—all of these were required by the Legislature from such owner and without any direct compensation to him for such expenditure. **Has the Legislature no right to enact laws such as this statute regarding factories unless limited to factories to be thereafter built?** Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health as against all owners of such property unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? **I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character and to mistake the foundations upon which they are placed"** (pp. 43–44).

The last sentence of this opinion is borne out in an interesting fashion by the celebrated case of Munn *v.* Illinois, 94 U. S., 113, in which the right to fix the charges of grain elevators was determined. There Mr. Chief Justice Waite used the words:

> "The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses

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and carriage and established his business **before** statute or the ordinance was adopted" (at p. 133)

We may also add the interesting case of Brick Church vs. N. Y., City, 5 Cow., 538.

Here New York City deeded to the Brick Church a piece of land for a burying ground with a covenant of quiet enjoyment.

Afterward, by an order of the Board of Health, it forbade interments.

The Church claimed that the order of the Board of Health impaired the obligation of a contract (*i.e.*, the covenant of quiet enjoyment).

Held, that the City could not so contract as to divest itself of its governmental power of preserving the public health.

It is a well accepted doctrine that no law is *ex post facto* which merely changes the remedy.

Note the reason, because the remedy is something:

"In which no one can be said to have a **vested right** and which the State, upon grounds of public policy, may regulate at pleasure.

Gibson v. Miss., 162, N. Y., 565, at p. 590.

This proposition, that there is **no vested right** in a remedy, has been stated even more suggestively by this Court by Mr. Chief Justice Waite in the case of Munn *v.* Illinois, 94 U. S., 113, where he broadly states that nobody has any vested right **in a rule of law.** That is precisely what the State of New York contends for in this Hawker case:

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, **no vested interest in**

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any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

"We know that this is a power which may be abused, but that is no argument against its existence."

Munn *v.* Illinois, 94 U. S., at p. 134.

The only way in which the defendant Hawker, under authority of the Cummings and Garland cases, can claim that he has sustained an additional punishment by reason of the operation of the New York statute is upon the theory that some **vested right** has been taken away from him.

Otherwise he is deprived of nothing. If such privilege as he had was enjoyed subject to the police power of the State, it follows logically that a modification or destruction of his privilege within the police power deprives him of nothing. That is the doctrine of the **Mugler** just quoted, and at this late day admits of no doubt.

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Perhaps the most beautiful illustration of this doctrine is in the recent case of Douglass v. Kentucky, 168 U. S., which has been handed down since the first argument of this case, upon Nov. 10, 1896.

In this **Douglass** case the plaintiff in error claimed that under a certain Kentucky charter a vested right to conduct a lottery was created, and that a subsequent statute which destroyed the right, thereby attacked vested rights of property and impaired the obligation of a contract.

By reason of its importance we note the case at length.

Douglas v. Comm. of Kentucky, 168 U. S., 488, s. c. 18. Sup. C. Rep., 199.

Per Harlan, *J.*—

> "Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the Legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries?
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> These questions arose and were determined, upon much consideration, in Stone v. Mississippi, 101 U. S., 814, 819, 821.
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> No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature

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and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of a power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Again, referring to lotteries: "They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by casting of lots, or by lot, change, or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in the sovereign capacity, and through their properly constituted agencies, **may resume it at any time** when the public good shall require, whether it be paid for or not. All that one can get by such a charter is suspension of governmental rights in his favor, subject to withdrawal at will, He has, in legal effect, **nothing more than a license** to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against the existing laws, but subject to future legislative and constitutional control or withdrawal."

Upon this general subject it is of peculiar interest to note that in the case of Calder *v.* Bull, 3 Dal.

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386, the great *ex post facto* case, Chase, *J.*, states that the resolution and decision complained of were not *ex post facto*, because

> "they took away no right of property vested in Calder and wife" (p 394).

This apparently insignificant phrase is most pregnant in view of the claim advanced by counsel—namely, that the New York statute in question takes away **no vested right** from Hawker. It would, therefore, seem to settle the question that the law, as to him, is not *ex post facto*.

These cases all show that when the State licensed the defendant Hawker to practice medicine, it did not and could not deed away **its power** and duty **to control or stop** his practice, if by such control or stopping it was essential to protect the interest of the people.

Hawker acquired **no vested right** to practice. He did not become sovereign over the State. It remained still sovereign over him.

If the State took away the right, in the exercise of its police power, **it deprived him of nothing.**

As this inconvenience constituted, in the theory of law, no deprivation of any vested right, it is preposterous to claim that **any new punishment** was added for any previous offence.

POINT XI.

The ex post facto clause of the Constitution does not restrain the legitimate exercise of the police power.

This topic is so extensive that counsel has considered it wise, under the circumstances, to embody it in a separate brief. Much collateral matter would

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be involved, and thereby the continuity of the main argument would be impaired.

POINT XII.

Cases analogous to the Hawker case.

The right of the State of New York to deny to Hawker a future privilege upon the ground that his unfitness has been proved by his past conduct is abundantly justified by the following cases.

They expressly establish the proposition that **a law denying such a privilege** upon the ground of past conduct is **not obnoxious,** either as *ex post facto* or as in the nature of a bill of pains and penalties.

One of these cases was decided by the Supreme Court of the United States.

In each of these cases **the past offense** was of such a character as to render the person **unfit to enjoy the privileges** desired. It was therefore held that the disqualification was **not additional punishment** for the past offense, but was merely the denial of a right to a person who by reason of his status was not fit to enjoy the right. In every case it was declared that the law involved **could not be considered ex post facto.**

Murphy vs. Ramsey, 114 U. S. 15.
(five cases decided together).

An Act of Congress of March 22, 1882, abridged the right of electors in the Territories under previous laws by denying to bigamists any further right to vote.

It was claimed that this law was **ex post facto as to those who were already bigamists.**

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Held, the law was **not ex post facto,** but was valid.

Per Matthews, *J.:*

> "It is argued that * * * to do so would give the statue a retrospective effect, and by thus depriving citizens of civil rights, merely on account of **past offenses,** or on account of acts which when committed were not offenses, would make it an **ex post facto** law, and therefore void (p. 40).
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> * * * * * *
>
> It is **not because** the person has committed the offense * * * and as an additional punishment for its commission that he is disfranchised (p. 42).
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> * * * * * *
>
> Upon this construction the statute is **not open to the objection** that it is an *ex post facto* law. **It does not seek** * * * **to operate as a punishment upon any offense at all.** The disfranchisement operates upon the existing state and condition of the person and **not upon a past offense.** He alone is deprived of his vote who, when he offers to register, is then in the state or condition of a bigamist (pp. 42, 43).
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> * * * * * *
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> It is precisely similar to an inquiry into the fact of nativity, of age, or of **any other status** made necessary by law as a condition of the elective franchise (p. 43).
>
> It rests with Congress to say whether, in a given case, any of the people resident in the

Territory shall participate in the election of its officers or the making of its laws; and it may therefore take away from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as it may deem expedient" (p. 44).

Washington vs. State, 75 Ala., 582 (1884), s. c. 51 Am. Rep. 479.

Indictment for voting **after conviction of a felony.** Convicted in 1871. The disqualification was caused by Constitution of 1875.

Per Somerville, *J.:*

"It is quite common, also, to deny the right of suffrage * * * to such as have been **convicted of infamous crimes.** The manifest purpose is to preserve the purity of the ballot-box. * * * The presumption is that one rendered infamous by conviction of felony or other base offense, indicative of great moral turpitude is **unfit** to exercise the privilege of suffrage. * * * It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities. * * * The exclusion must, for this reason, be adjudged **a disqualification, imposed for protection and not for punishment** * * * withholding an honorable privilege, and not denying a personal right or attribute of personal liberty. * * *

The clause of the Constitution * * * cannot, for the foregoing reasons, be considered as either an **ex post facto** law * * * or as in the nature of a bill of attainder. * * * It neither takes away any legal right nor imposes any legal burden.

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(Distinguishing Cummings' case, 4 Wall, 277, and Garland case, 4 Wall, 333).

Foster vs. Police Commissioners, 102 Cal., 483 (May, 1894).

Held: That a retrospective ordinance **depriving** persons of the right to a liquor license who have been **convicted of felony,** or who have carried on the business of selling liquors in places of amusement where females were employed, is **not an ex post facto law,** but simply **furnishes a standard** applicable to all persons by which their **fitness** to conduct a business, in itself dangerous to the morals and good order of the city, shall be measured.

Per Haynes, *C.:*

> Though not an *ex post facto* law, it is retrospective in so far as it determines from the **past conduct** of the party **his fitness** for the proposed business. Felons are also excluded from obtaining such a license, **not as an additional punishment,** but because the **conviction of a felony is evidence of the unfitness** of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before.

United States vs. Chew Cheong, 61 Fed. Rep., 200 (April, 1894).

Here a Chinaman had been **convicted of a felony. Afterward** by law his right to take out a certificate to prevent his deportation was denied, for the law did not permit such certificates to be taken out by persons convicted of felony.

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It was claimed the law was **ex post facto** as to him.

Held per Morrow, *J.:*

The law was not *ex post facto;* for the government had the inalienable right to expel all aliens; and **to select criminals** for deportation was the exercise of a **just discrimination in the administration of the laws and a wise authority in preserving the institutions of the country."**

(Cites nothing.)

POINT XIII.

Certain arguments of the defendant answered.

First.

Defendant claims that the Dent case, 129 U. S., 114, only allows the State to impose

> "such qualifications as are attainable by **reasonable study or application."**

Whereas Hawker **can never undo** the fact that he is a convict.

This misstates the Dent case seriously. The Court, speaking of valid requirements, says:

> "It is only when they have **no relation to such calling or profession,** or are unattainable by reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation" (p. 122).

As good moral character is a recognizedly proper qualification of a physician, "it bears a relation to

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such calling or profession," within the doctrine of the Dent case. By requiring it, the State protects its people

> "against the consequences * * * of **deception and fraud**" (Dent case, p. 122).

Therefore if Hawker's bad character is so adjudicated that it cannot be rehabilitated, that is **all the more reason** why he should be excluded from the practice.

The whole question turns upon the reasonableness of the regulation, not its possibility or impossibility.

Many conditions may be impossible to a given individual. The President of the United States must be a native American. Every naturalized citizen is therefore excluded. With but little exception only men can vote. All women are therefore excluded. Policemen and soldiers must be of a certain height and weight. All undersized persons are excluded.

It may be utterly impossible for a given individual to come up to a given requirement, yet the requirement may be reasonable to impose.

The State of New York now requires a certain **moral stature** in practitioners of medicine. Hawker does not attain that stature. But this circumstance does not even tend to show that the requirement of a moral stature is unreasonable.

It may be added, however, that it is **not impossible** to undo the fact that he is an ex-convict. He might possibly get a pardon which would restore his rights.

Ex-parte Garland, 4 Wall, 333.

It is believed that this argument of the defendant involves a *reductio ad absurdum*.

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If, as to Hawker, the present qualification is unattainable, he has only himself to blame, for by his own vile act he put himself in this position. He cannot now be heard to qualify his own wrong and claim that **by his own wrongdoing** he has estopped the State of New York from making him a proper subject of regulation.

This argument is somewhat similar to the argument in a French murder case which counsel once read. The defendant therein was on trial for having killed his father and his mother. His advocate appealed to the Court for consideration for his client upon the ground that he was **a poor orphan.**

Second.

His counsel admits that

> No doubt the Legislature intended only to insure the good moral character of practitioners,

and that

> It is not denied that the law under which this indictment is found might be good if it is construed prospectively, *i. e.*, as to felonies committed after its passage.

If the power of regulation is admitted at all, it must comprise **all practitioners, future or present.** Otherwise counsel "mistake the foundation upon which the law is placed."

> Health Dept. *vs.* Rector, 145 N, Y., at p. 44.

Third.

He claims that his right was taken away without complaint, examination, witnesses, trial, judge or

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jury ; that he is made to be a witness against himself, etc., etc., etc.

Such a "formidable arraignment" was attempted in Mugler *vs.* Kansas, 123 U. S., 643, at page 672, where the Court brushed it aside almost contemptuously.

The obvious answer is that he had **no vested right** to continue his practice.

For his **voluntary offense** in continuing to practice after his license to do so was abrogated, he was tried with every safeguard which the Constitution guaranteed him.

Fourth.

Defendant claims

> that when the statute authorized the Medical College to give him his diploma, it clothed him with the right to practice medicine.

If this means anything, it means that the State bartered or sold or deeded away its police power. This is not reasonable. It has been held over and over that by no such act can the sovereign power disable itself.

> Brick Church v. N. Y. City, 5 Cow., 538.
> Mugler v. Kansas, 123 U. S., 643.
> Gray v. Conn, 129 U. S., 74.
> Douglass v. Kentucky, 168 U. S.

Fifth.

Defendant claims

> that when he had served his term for his original felony, the State could not again take his original offense into account in considering his fitness.

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That the State is bound by its contracts as to punishment, even with criminals.

The bare statement of these propositions is ample to prove their absurdity.

Carried to their logical conclusion they would erect ex-convcts into a **privileged class.** They would be made sovereign over the State; the preposterous proposition would follow that when fitness was to be taken into account, their **admitted and adjudicated unfitness** could not be considered.

The felon's brand would take on a new significance.

In the language of Justice Grier, they would have

"A vested right to do wrong."

Freeborn v. Smith, 2 Wall., 160, 175.

It is enough to add that this claim of the defendant, if followed by the Court, would necessitate the overruling of the carefully considered cases of Murphy vs. Ramsay, 114 U. S., 15, Washington vs. State, 75 Ala., 582; Foster vs. Police Commrs., 102 Cal., 483, and U. S. vs. Chew Cheong, 61 F. R., 200.

These are the cases that hold that **past conviction** may be taken as proof of **present unfitness,** and were quoted, *supra* **Point.**

POINT IV.

The Act to be presumed constitutional: Its harshness no argument.

It is believed that enough has been shown in the foregoing pages to make it plain that the Legislature

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of the State of New York has the right to control the practice of medicine as a matter of law, and to make it also plain that the requirement of good moral character is reasonable as a matter of fact.

It is not for the people to show that this statute is constitutional. The *onus* is on the defendant to make it plain that the statute is unconstitutional, as exceeding the power of the Legislature.

This proposition may be dismissed by a mere reference to the words of Chief Justice Marshall:

> "The question whether a law be void for its repugnance to the constitution is at all times a question of much delicacy which ought seldom, if ever, be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgment would be unworthy of its station should it be unmindful of the solemn obligation which that station imposes, but it is not upon slight implication that the Legislature is to be pronounced to have transcended its powers, and its acts be considered as void. The opposition between the Constitution and the laws should be such that the Judge feels a clear and strong conviction of their incompatibility with each other."
>
> Fletcher vs. Peck, 6 Cranch., 87, at p. 128.

As bearing upon the intention of the Legislature to protect the public health, and as negativing any conclusion that it was the object of the Legislature to punish the defendant, Hawker, it is enough to call attention to the character of the act now before the Court.

This act is Chapter 25 of the General Laws, entitled **"The Public Health Law."**

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It applies to all manner of subjects. Without going into particulars, its various articles are as follows:

Article 1. State board of health.
" 2. Local boards of health.
" 3. Adulterations.
" 4. Tuberculosis and glanders.
" 5. Potable waters.
" 6. Quarantine at the port of New York.
" 7. The health officer of the port of New York.
" 8. Practice of medicine.
" 9. Practice of dentistry.
" 10. Veterinary medicine and surgery.
" 11. Pharmacy.
" 12. Miscellaneous provisions.

The regulation of the practice of medicine is only one feature of this great act, and the incidental disqualification of convicted felons **is but a single phrase of a single article.** The general purpose of the Legislature to protect the Public Health is, therefore, abundantly established.

Assuming that there were any doubt as to the purpose of the Legislature, that doubt must be resolved in favor of the act.

People v. Warden, 144 N. Y. 529.
Soon Hing v. Crowley, 113 U. S. 703.
Sweet v. Rechel, 159 U. S. 380.

If the laws enacted by a State be within the sphere of the legislative power, * * * the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law, * * * The remedy for evils of that character is to be sought from State legislatures.

Ry. Co. v. Humes, 115 U. S., 512, 520.

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POINT IV.

The question is one of sovereignty.

In the language of Chief-Justice Marshall:

"The question is in truth **a question of supremacy**" (4 Wheat, 433).

Either Hawker is sovereign over the State of New York or the State of New York is sovereign over Hawker.

If the contention of the defendant was sustained, then, in the language of the Court of Appeals, the State of New York

"would not be sovereign."

34 N. Y., 657.

And in the language of the same case, the defendant's contention

"challenges legislative authority exercised since the origin of the Government."

Any claim that by reason of an existing diploma the defendant Hawker was beyond the power of the State of New York, acting for the public benefit, to control or stop his practice, amounts simply to an argument that the police power which granted Hawker his right is without force to control that right should circumstances require its future control. This would practically involve **overruling** the doctrines laid down by the Court of Appeals and the United States Supreme Court, which we have so fully cited, namely:

Health Department vs. Rector, 145 N. Y., 32.

Mugler vs. Kansas, 123 U. S., 643.

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Board of Excise vs. Barry, 34 N. Y., 667.
Dent vs. West Virginia, 129 U. S., 114.
Gray vs. Conn., 159 U. S., 74.

These cases are all leading, and are merely typical of many others which guarantee the right of the sovereignty in the exercise of its police poper to impose such **new conditions** by way of regulation as the public benefit demands ; and make the Legislature (within the scope of its power) the sole judge of the necessity.

It is even a more serious proposition, but one which seems unanswerable, that the contention of Hawker would **absolutely overrule** the four cases, namely:

Murphy vs. Ramsey (and four other cases), 114 U. S., 15.
Washington vs. State, 75 Alabama?
U. S. vs. Chew Chong, 61 Fed. Rep. 200.
Foster vs. Police Commissioners, 102 Cal., 482.

In these four cases the **precise doctrine** was laid down which is contended for here—namely, that by reason of the conviction of a felony a person's character might thereby be deemed bad, and for that reason the Legislature might deny him privileges which it was within the power of the Legislature to control.

These cases recognize the doctrine that such control **does not have as its object additional punishment** for the unfortunate individual, but could have as its object **the protection of the public** against persons manifestly unfit.

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CONCLUSION.

If the defendant Hawker's contention were adopted by this Court, it would follow that the sovereign power of the State to regulate the practice of medicine would be denied in the very respect in which it is most essential.

Those who, by reason of actual past conviction, were **most unfit** would be beyond control.

But these are the very people over whom control is most essential.

To control such—

> "is the exercise of a **just discrimination** in the administration of the laws and a wise authority."
>
> U. S. vs. Chew Cheong, 61 Fed. Rep. 200.

It is believed that the two great requisites of a physician are—

I.—**A technical education,** and

II.—**A good moral character.**

An overwhelming and imposing array of statutes and decisions shows that this is the common understanding of English speaking peoples.

The **Dent** case, 129 U. S. 114, has established beyond question the right of the State to determine educational qualifications of physicians, and the coexisting right of the State to alter those qualifications and **to exclude existing practitioners** who do not comply with new conditions imposed for the protection of the public.

It is hoped that the event of this prosecution will be to supplement and round out the doctrine of the

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Dent case, by establishing the proposition that the power of the State is co-extensive when the qualification of **good moral character** is involved.

It is hoped that it will be held that the State of New York has the right to protect its people against practice by ex-convicts, and that it will be held that **the exclusion of an ex convict is a mere regulation of the police power.**

It is hoped that the Court will, in the language of Ex parte Wall, 107 U. S. 265, say that this disqualification is **in no sense a punishment**, but is a step for the protection of the public.

It is hoped that the Court will hold that Hawker's license is not such a vested right as to be beyond the constitutional power of the State of New York to disqualify him if he cannot comply with new regulations as to moral character established for the public protection.

It is hoped that the **Cummings** and **Garland** cases will be distinguished here, as they were distinguished in the *Dent* case, as

(1) **Aimed at past acts.**

(2) **Designed to punish.**

(3) Calling for qualifications which had **no connection** with the professions.

It is hoped that this Court will hold that it is the intention of the New York statute

> "to secure such (**good moral character**) in the profession of medicine that the community might **trust with confidence those receiving a license under the authority of the State.**"
>
> (Dent case, 129 U. S., at 128).

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As a means of strengthening the hands of those who are attempting to enforce the Medical Law, it is hoped that the result of this appeal will be the promulgation by the Court of an opinion in which the true status of a physician will be broadly and fundamentally determined. It is hoped that the Court will lay down the principle that **the relation of the State and a physician is that of licenser and licensee;** and for that reason the State has the power to control, modify or abridge the privileges of the physician-licensee by reasonable general regulations, affecting either technical education or good moral character; and that, for the protection of the public, the State has the power to require practitioners to possess qualifications either of education or of character, even if **existing practitioners** who do not possess such qualifications have to be thereby **excluded from practice.**

It is apparent that if the State has not the power to protect the public by denying to persons of bad character the right to practice medicine, then and in that event its control of the practice will be more apparent than real.

The judgment of the Court of Appeals of the State of New York should be affirmed.

ASA BIRD GARDINER,
District Attorney;

ROBERT C. TAYLOR,
Counsel of the Medical Society of the County of New York, of Counsel.

No. 415.
Sup. Brf. of Gardiner & Taylor for D. E.
Filed Mar. 9, 1898.

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In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

ASA BIRD GARDINER,
District Attorney

ROBERT C. TAYLOR,
Counsel of the Medical Society,
of the County of New York,
of Counsel.

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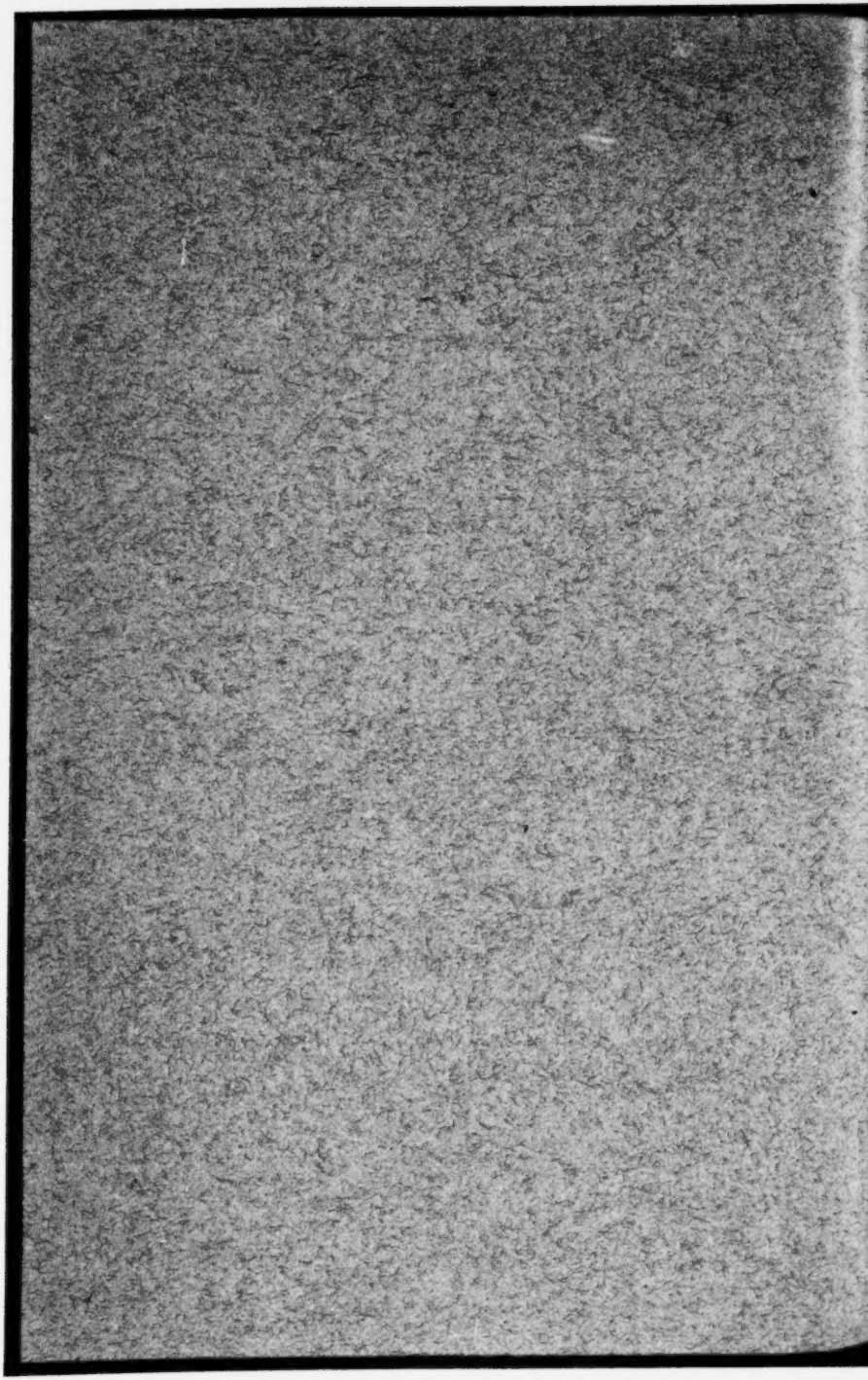

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
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The range of argument in this case is so vast that, for reasons of convenience, it has been thought wise to divide it up into two briefs.

The first or main brief establishes, it is hoped, a broad question of law; namely, that **the exclusion of an ex-convict from the practice of medicine is a proper exercise of the police power.**

In this supplementary brief it is proposed to argue that the legitimate exercise of the police power is not restrained by the *ex post facto* clause of the Constitution.

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POINT I.

The Scope of this Brief Outlined.

In this brief it is taken for granted that the Constitution of the United States was designed to create a new system, and that certain of its provisions, particularly the contract clause and the *ex post facto* clause, were intended to remedy what, in the light of history, had proved to be an intolerable condition of affairs.

It is believed, however, that no violent change in the essential nature of the State governments was designed; and that it was not contemplated by any of the States, which adopted the Constitution, that their sovereign police powers over internal regulation would be in any essential abridged.

Certain admitted mischiefs were, of course, to be corrected.

To this end, along customary lines of construction, the **Old Law,** the **Mischief** and the **Remedy** will be considered; and as much light as can be gathered from numerous decisions of this Court will be brought to bear upon the relation of the *ex post facto* clause to the reserved police power of the State.

POINT II.

The Old Law, the Mischief and the Remedy.

One of the accepted canons of construction is:

> "Advert to the three Points of the **Old Law,** the **Mischief** and the **Remedy,** and let the construction tend to suppress the Mischief, and advance the Remedy."
>
> 1 Minor's Insts., p. 40, citing 1 Bl. Com., 87.

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That this principle of construction is applicable to the Constitution has been frequently determined. We content ourselves with a single reference to the words of Chief Justice Marshall, who, at the beginning of his celebrated opinion in the Dartmouth College Case said with reference to the contract clause:

> "Since this clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy."
>
> Dartmouth Coll. Case, 4 Wheat., at p. 628.

POINT III.

The Old Law: the untrammelled powers of the States at the time of the adoption of the Constitution.

It is a matter of history that at the time of the adoption of the Constitution the several States were independent sovereignties, each of which was possessed of all the powers of the British Parliament.

This was, so to speak, the old order —— the **Old Law.**

The sovereign independence of the States at that time has been freqently commented upon by this Court.

For example they were referred to by Baldwin, *J.*, as—

> "Those States, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the Revolution, the prerogative of the Crown, and the transcen-

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dent power of Parliament devolved, in a plentitude unimpaired by any act, and controllable by no authority."

R. I. *v.* Mass. 12 Peters, p. 720.

Again, by CHASE, *J.:*

"Not that the United Colonies jointly in a collective capacity, were independent States, etc., but each of them was a sovereign and independent State, that is, that each of them had a right to govern itself by its own authority and own laws without any control from any other power upon earth."

Ware *vs.* Hylton, 3 Dall, at p. 224.

And recently in the expressive language of Chief-Justice Waite:

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves."

Munn *vs.* Illinois, 94 U. S., at p. 124.

In those days the States had the power to pass bills of attainder.

Cooper *vs.* Telfair, 4 Dall., 14.

And likewise power to pass laws impairing the obligation of contracts.

Owings *vs.* Speed, 5 Wheat., 420.

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That they had also the right to pass *ex post facto* laws must go without saying; for otherwise the inhibition against passing such laws, contained in the Constitution, would have been needless and would now be unmeaning.

POINT IV.

The mischief; the precise meaning of ex post facto.

By way of introduction we would note that the **ex post facto** clause does not stand by itself in the Constitution, but that the clause is as follows:

> "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; **pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts**; or grant any title of nobility."
>
> U. S. Cons., Art. 1, Sec. 10, Sub-d. 1.

It appears at once that the *ex post facto* clause is associated with the prohibition against passing bills of attainder and laws impairing the obligation of contracts.

In the language of Johnson, *J.*, in Ogden *v.* Saunders, 12 Wheat, 266.

> "By classing bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision

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> against arbitrary and tyrannical legislation over existing rights, whether of person or property" (p. 286).

In the same way Mr. Justice Miller, in Kring *v.* Missouri, 107 U. S., 221, discussed the contract clause and the *ex post facto* clause, together saying with regard to the *ex post facto* clause:

> "Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence of the Constitution which forbids the States to pass any law impairing the obligation of contracts (page 232–3).
> * * * * * * *
> "Why should not the contiguous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction?" (pages 233–4).

This circumstance is noted for the reason that in the course of the argument many illustrations have been taken from the decisions of this Court relating to the **contract clause** of the Constitution, and counsel believes that as both clauses are *in pari materia*, any illustrations drawn from the literature of the one will be apt and pertinent as illustrating the other.

In attempting to arrive at the exact meaning of the words *ex post facto*, it is of supreme interest to notice that in the case of Calder *v.* Bull, 3 Dal., 386, in which the *ex post facto* clause was first construed, the Court, through Chase, *J.*, expressed itself as follows:

> "The prohibition, 'that no State shall pass "any *ex post facto* law,' necessarily requires "some explanation; for naked and without

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"explanation it is unintelligible, and means "nothing (p. 390).

* * * * * *

"I am under a necessity to give a construc- "tion or explanation of the words '*ex post* "*facto*,' because they have not any certain "meaning attached to them" (p. 395).

It is obvious, therefore, that it is to Calder *v.* Bull that we must look, both to see exactly what *mischief* the framers of the Constitution sought to suppress, and also to see if the Statute of the State of New York which is now before the Court produces **such mischief as was then sought to be guarded against.**

Counsel has made an exhaustive examination in various directions, with a design of ascertaining what the words "*ex post facto*" mean, but in no place has he found a fuller statement than in the case of Calder *v.* Bull. This statement is so pertinent to the question now before the Court, that the words of the case are quoted at great length.

The design is to show exactly what was in the mind of the framers of the Constitution when the clause in question was adopted.

Calder *v.* Bull, 3 Dall., 386.

Per CHASE, *J.*

"The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of

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judicial power. Sometimes they respected the crime by declaring acts to be treason which were not treason when committed; at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit; at other times they inflicted punishments where the party was not by law liable to any punishment; and in other cases they inflicted greater punishment than the law annexed to the offense. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. **To prevent such, and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder, or any ex post facto law** (p. 389).

* * * * *

"The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, **and shall punish him for having done it.** The prohibition, considered in this light, is an additional bulwark in favor of the personal

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security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts (p. 390).

* * * * *

"The expressions '*ex post facto* laws,' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

"I also rely greatly on the definition, or explanation of *ex post facto* laws, as given by the conventions of Massachusetts, Maryland and North Carolina, in their several constitutions or forms of government.

"In the declaration of rights by the Convention of Massachusetts, part first, section 24th: 'Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws are unjust, etc.'

"In the declaration of rights, by the Convention of Maryland, article 15th: 'Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, etc.'

"In the declaration of rights by the Convention of North Carolina, article 24th, I find the same definition precisely in the same words as in the Maryland Constitution.

"In the declaration of rights by the Convention of Delaware, article 11th, the same

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> definition was clearly intended, but inaccurately expressed, by saying: 'Laws punishing offences (instead of actions, or facts) committed before the existence of such laws, are oppressive, etc.'" (pages 391–2).

Here, then, is a vivid picture, painted by an eyewitness, of the nature of the mischief which the *ex post facto* clause was designed to suppress. Not a word of this opinion can be appealed to to sustain any claim that the *ex post facto* clause was designed to abridge the police power.

Indeed, the case holds, expressly the other way; for in defining the limitations upon tyrannical power imposed by the *ex post facto* clause, CHASE, *J.*, with abundant caution, says:—

> "It appears to me a self-evident proposition that the several State legislatures retain all the powers of legislation delegated to them by the State constitutions, which are not expressly taken away by the constitution of the United States."
>
> 3 Dall., at p. 387.

Counsel would now, in passing, add the testimony of Chief Justice Marshall as to the origin of *ex post facto* laws, in which the justification for their existence is expressed as follows:

> "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the **violent acts** which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those **sudden and strong passions** to which men are exposed. The restrictions of the legislative power of the States are

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obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

Fletcher *v.* Peck, 6 Cranch, 328, at pp. 337–8.

Thus we see that at the beginning, this Court carefully recognized the origin of the *ex post facto* clause; held that it was designed to restrain the **violent passions of men**; and held that it was to be limited to the prohibition of retrospective laws of a penal or criminal character.

This doctrine has been steadily adhered to.

Watson *v.* Mercer, 8 Pet., 88.
Carpenter *v.* Penn., 17 How., 456.
Locke *v.* New Orleans, 4 How., 172.
B. & S. R. R. Co. *v.* Nesbit, 10 How., 395.

The striking feature of all this lies in the fact that, at the very outset this Court took the unmeaning words *ex post facto* and gave them a most limited signification.

This was done because the Court would not *by implication* cut down the authority of the State of Connecticut, whose law was thus assailed (see opinion, p. 387), and because the Court **would not go farther than it felt itself bound to go**; nor declare any law void except in a very clear case (p. 395).

By subsequent adjudication another marked limitation has been superadded, in favor of the States; namely that a statute which merely **affects the remedy** cannot be considered *ex post facto*, as the States never surrendered control over mere legal procedure.

See Gibson *v.* Mississippi, 162 U. S., 565, and cases cited.

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Counsel has pondered these cases. He can see no likeness between the passionate and violent measures denounced in Calder *v.* Bull, and the carefully devised statute of New York which seeks to protect its people against practitioners of medicine who have attained infamy.

POINT V.

The Remedy which the ex post facto clause was designed to effect.

It is not desired to make the form of the argument too artificial. Nevertheless it seems fair to conclude that the Remedy intended to be gained by the *ex post facto* clause, like the remedy designed to be gained through the prohibition of bills of attainder or laws impairing the obligation of contracts, was to disable the individual States from perpetrating wrong upon their respective citizens.

Looked at from this point of view it is impossible to see how, from these "associated clauses," the States can be held to have intended to divest themselves of their legitimate police power.

We do not find any case in which it is held in terms that the *ex post facto* clause does not affect the police power of the State. This proposition, however, follows by necessary inference from well considered decisions with relation to the associated contract clause, and other clauses of the Constitution or its amendments.

Thus with regard to the *contract clause* we have the words of Chief Justice Marshall:

> "Since the clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined,

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to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution **did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."**

Dartmouth College Case, 4 Wheat, at p. 628–9.

In another great case the Court held that the contract clause was not intended to impair the police power, and the reasoning of WASHINGTON, *J.*, is unanswerable.

"It is apparent that the sphere of State legislation upon subjects connected with the contracts of individuals, would be impaired **beyond what it can for a moment be believed the sovereign states of this Union would have consented to**; for it will be found upon examination that there are few laws which concern the general police of the state, or govern the citizens in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form."

Ogden *v.* Saunders, 12 Wheat., at page 258–9.

The reason given—**that the States would never for a moment have consented to such divestment**—is most striking.

We have already seen that under the decisions in Ogden *v.* Saunders, 12 Wheat., 213, at page 286, and

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Kring *v.* Missouri, 107 U. S., 221, at page 223, the analogies between the *ex post facto* clause and the contract clause are complete. Hence it follows, by parity of reasoning, that the sovereign States would never for a moment have consented to any impairment of the sphere of State legislation, upon like matters, when they adopted the *ex post facto* clause.

In the period of doubt and indecision which followed the promulgation of the Constitution and preceded its adoption by the States, we know that there was great uncertainty as to whether the States would adopt it at all.

It was feared that such a mighty structure might be reared that the State governments would run the danger of annihilation. With the adoption of the Constitution the first ten amendments were added, as limitations upon the powers of the Federal Government.

A contemporaneous account of the reluctance with which the Constitution was adopted is vividly given in the pages of the *Federalist.* The assurances of its gifted authors may be accepted now as representations in reliance upon which the States were induced to part with such of their sovereignty as they surrendered to the general government.

We reproduce the words of HAMILTON which held out to the States the promise that by so doing they would not surrender the integrity of their control over **"internal order, improvement and prosperity."**

The Federalist, No. XLIV and XLV (Dawson's edition).

"The powers reserved to the several States will extend to all the objects, which in the ordinary course of affairs concern the lives, liberties and

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properties of the people and the **internal order, improvement and prosperity** of the State (page 323).

* * * * * * *

By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for (page 326).

* * * * * * *

The powers proposed to be lodged in the Federal Government are as little formidable to those reserved to the individual States; as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded of a meditated and consequential annihilation of the State Governments must, on the most favorable interpretation be ascribed to the chimerical fears of the authors of them." (page 333).

The solemn assurances thus held out by the far-seeing Hamilton have been amply vindicated by this Court; and the doctrine has been repeatedly laid down that, except as far as it is restrained by the Constitution, the Sovereignty of the States remains unimpaired.

> "These powers proceed not from the people of America, but from the people of the several States, and remained after the adoption (of the Constitution) what they were before, except so far as they may be abridged by that instrument.'
>
> Sturgis & Crowninshield, 4 Wheat., 122, per MARSHALL, *C. J.*, at 192-3.

Or in the words of TANEY, *C. J.*,

> "We cannot deal this with the rights reserved to the States, and by legal intendment and mere technical reasoning take away from them any portion of that power over their own **internal police,** and improvements which

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is so necessary to their well being and prosperity."

Charles River Bridge Case, 11 Pet., at p. 552.

But not only does this condition of affairs repose upon general principles and upon the accepted history of the nation; but, moreover, the jealousy of the people of the States lest the sovereignty of the States should be unduly diminished by the Constitution, is shown by the positive terms of the **Tenth Amendment** to the Constitution:

> "On the other hand it is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States.
>
> These deductions do not rest upon general reasons, plain and obvious as they seem to be. They have been **positively recognized** by one of the articles in the amendments of the Constitution which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'".

Per STORY, *J.*, in Martin *vs.* Hunter's Lessees, 1 Wheat., 304. at p. 325.

In this connection we may add with advantage the solemn language of the great Chief Justice MARSHALL, in Barron *v.* Baltimore, 7 Pet. 244, in which the reason for the adoption of the first ten amendments was at length discussed.

He recapitulates the history of the times;—that the great Revolution, which established the Constitution of the United States, was not effected without

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immense opposition; that serious fears were entertained that the powers which the patriotic statesmen deemed essential to union might be exercised in a manner dangerous to liberty; and that the amendments demanded security against the apprehended encroachments of the general government, and that to quiet the fears thus extensively entertained the amendments in question were adopted.

In the present topic we have confined ourselves as closely as possible to the proposition that **contemporaneous history and exposition** show plainly that it was not part of the intention of the States to surrender up any portion of their legitimate police power, when they adopted the Constitution. As the right to exclude a convicted felon from the practice of medicine would have been abundantly within the powers of the States, we confidently conclude that the States cannot be held, by any method of argument, to have intended to surrender that power of exclusion.

POINT VI.

This Court has consistently maintained the reserved powers of the States.

Since the adoption of the Constitution, this Court has consistently maintained the reserved powers of the States.

As to the mere elaboration of the subjects controlled by the police power, we are not concerned. All agree that it comprises the regulation of the practice of medicine; and the many cases presented in our main brief sufficiently cover that topic.

We desire in this point briefly to collate the

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various constitutional provisions which have been appealed to by lawyers in efforts to declare State statutes unconstitutional.

This Court has more than once expressed its surprise at these constantly repeated assaults upon State legislation. For instance, in Davidson *vs.* New Orleans, 96 U. S., 97, Mr. Justice Miller refers to the "strange misconception of the scope of the provision as found in the Fourteenth Amendment"; and states that it seems to be looked upon as a means of bringing before the Supreme Court of the United States the abstract opinions of every unsuccessful litigant in the State Courts of the justice of the decision against him, and of the merits of the legislation upon which such a decision may be founded.

And later and in R. R. Co. *vs.* Humes, 115 U. S., 512, Mr. Justice Field repeats these words of Mr. Justice Miller:

> "with an expression of increased surprise
> "at the continued misconception."

A bare reference to these decisions is made; but in each instance it will be found that the Court has held that the legitimate exercise of the police power involves no excursion beyond the proper limits of State power as defined by the Constitution or its amendments.

Of these in order:

Amendments 1 to 10 inclusive do not restrain the police power.

> Barron *vs.* Mayor, 7 Pet., 243, and many other cases.

Nor do the 13th, 14th or 15th amendments.

> Slaughter House Cases, 16 Wall., 36.
> Plessy *vs.* Ferguson, 163 U. S., 537.

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Nor does the "letters-patent clause" prevent State regulations of the sale of a dangerous article.

Patterson *vs.* Kentucky, 97 U. S., 501.

Nor does the "taxes duties, imposts and excises" clause prevent local pilotage regulations.

Cooley *vs.* Wardens, 12 How., 299.

Nor does the commerce clause interfere with purely internal control.

Hennington *vs.* Georgia, 163 U. S. 299, as a type of many cases.

Nor does the naturalization clause prevent a State from putting a foreigner upon the same footing as its own citizens.

Dred Scott *vs.* Sandford, 19 How., 393.

Nor does the bankruptcy clause invalidate State laws not conflicting.

Ogden *vs.* Saunders, 12 Wheat., 213.

Nor does the "punishment of counterfeiting" clause prevent the States from punishing the circulating of counterfeit money.

Fox *vs.* Ohio, 5 How., 410.

Nor does the *ex post facto* clause inhibit retrospective legislation of other than a criminal or penal character, or which merely affects the remedy.

Calder *vs.* Ball, 3 Dall., 386.
Gibson *vs.* Miss., 162 U. S., 565.

All of these cases, so briefly cited, show that there is no inherent antagonism between the legitimate exercise of the police power and the United States Constitution.

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As far as the consistency of the police power with the "contract clause" is concerned, that doctrine has been worked out so exquisitely that a more analytical presentation of it seems necessary.

From the beginning it was held that without impairing the obligation, the remedy might be modified as the State might ordain.

Sturges *vs.* Crowninshield, 4 Wheat., 122.

For, as was later said by WAITE, *C. J.:*

> "The regulation of the forms of administering justice by the Courts is an incident of sovereignty. The surrender of this power is never to be presumed."

Cairo & F. R. R. *vs.* Hecht, 95 U. S., 168.

When the question of the obligation of the States' own alleged contracts—*i. e.*, charters and other authorities—came before the Courts; at first the great decision in the Dartmouth College Case seemed to raise an insurmountable barrier against the possibility of subsequent modification.

But later the necessity of making new regulations, to meet new conditions asserted itself.

Thus where **monopolies** are claimed, in a series of cases commencing with the Charles River Bridge Case, 11 Pet. 552 and ending with the recent case of Water Power Co. *v.* Water Commrs. 168 U. S. 349, it seems to be held that such grants are subject to the paramount right of the State to make later grants if the public interests require it.

Again as to grants giving **exemptions from taxation,** the most recent ruling seems to hold that they are mere bounties, not containing any of the elements of a pure contract.

See Grand Lodge *v.* New Orleans, 166 U. S., 143.

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Again (and in this development we are peculiarly interested) where matters involving the **public morals,** such as lotteries or the liquor traffic, are concerned ; or where matters involving the **public health** are concerned, apparent authorities, whether by charter or otherwise, are held to be mere licenses subject to later control.

Beer Co. *v.* Mass., 97 U. S. (liquors).
Gray *v.* Conn., 259 U. S. 74 (liquors).
Stone *v.* Miss., 101 U. S. 814 (lotteries).
Douglass *v.* Ky., 168 U. S. 488 (lotteries).
Dent *v.* W. Va., 129 U. S. 114 (medicine).

And these later cases have emphatically stated the sound doctrine of overruling necessity.

Namely :

That the Legislature cannot, by any grant, divest itself of its police power; nor bind its successors in such a way as to deprive them of the power of legislating for the public good.

It is upon this doctrine that the people of the State of New York rest this Hawker Case.

POINT VII.

Cummings and Garland cases, 4 Wall, 277, distinguished.

As the claim of the defendant that the statute under observation is unconstitutional, is based upon these Cummings and Garland cases, the Court will surely give them painstaking consideration. In this connection we desire only to bring out prominently the *ratio decidendi* of the cases. Stripped of all verbiage, the decision of the Court was upon the ground that the disqualification pro-

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duced by the test oath was, as a matter of fact, **punishment, and designed as such**.

The Court discusses :

(1) The *unprecedented severity* of the test oath, which allowed no distinction between acts springing from malignant enmity, and such as might be prompted by charity, affection or relationship (pp. 316–7).

(2) That the test oath bore *no relation* to the fitness for the profession (p. 318).

(3) That the test oath related only to *past acts* (p. 319).

This is the gist of these cases, and it is believed that there is no fair analogy between them and the Hawker case.

As discovering the very essence of the case ; viz., that the deprivation complained of was, in fact, punishment, the exact words at page 320 are most material :

> "The deprivation of any rights, civil or political, previously enjoyed, **may be punishment,** the circumstances attending and the causes of the deprivation determining this fact" (p. 320).

We must not overlook the use of the salient word **"may,"** for therein lies the whole reasoning of the case. The "circumstances attending," and the "causes of the deprivation" were manifestly the bitter passions engendered by the war ; and it is respectfully submitted that there is not a "circumstance attending" in this Hawker case which will bring it within the rule of the Cummings or Garland cases.

The above words **"may be punishment"** find strong support in the words of WAITE, *C. J.*:

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> "From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances **they may, but not under all.**"
>
> Munn *vs.* Illinois, 94 U. S., at p. 125.

It is pertinent to observe, at this point, that the civil war brought to pass not only "test oaths"; but likewise the provisions of the 13th, 14th and 15th Amendments.

To the interpretation of these amendments the energies of this Court have been addressed for thirty years; and its innumerable decisions have developed and firmly established the doctrine that the incidence of a police regulation involves **no deprivation** of life, liberty or property such as is contemplated by the amendments.

Consult, among many cases,

Barbier *vs.* Connelly, 113 U. S., 27.
In re Rahrer, 140 U. S., 545.
Giozza *vs.* Tiernan, 148 U. S., 657.
R. R. Co. *vs.* Bristol, 151 U. S., 556.

The question is one of legislative **intent**; and the Court must assume that the legislative intent was to protect the public health.

Sweet *vs.* Rechel, 159.

The **Dent** case, which we have presented at such length in the main brief, makes the legislative intent the turning point; for it distinguished the **Cummings** and **Garland** cases upon the ground that they were designed to punish, and sustained the law of West Virginia as intended to secure skill and learning in the practice of medicine,

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so that the community might trust with confidence one receiving a license under authority of the State.

Dent case, 129 U. S., at p. 128.

In a recent case where a regulation of Georgia as to Sabbath work on railroads was assailed as regulating interstate commerce, the Court looked at the legislative **intent** and saw nothing to suggest that there was any other purpose than to prescribe a rule of civil duty for all, who, on the Sabbath day, were within the territorial jurisdiction of the State.

Hennington *v.* Georgia, 163 U. S., 299.

In this **Hawker** case, as in the case last cited, and as in **Dent** case, the essence of the legislation lies in its **intent to protect the public,** and there is a total absence of intent to punish.

Upon this question of intent, this Court has, in the recent case of Moore *v.* Missouri, 159 U. S., 673, very fully shown that a previous conviction may be taken into account, and yet the action of the State in so doing could not be regarded as punishment. There a statute enacted that for subsequent offences heavier punishment should be imposed upon the offender We do not quote from the opinion, but note that Mr. Chief Justice Fuller, upon page 676, observes "that the increased severity **is not a punishment for the same offence** for the second time, but a severer punishment for the subsequent offence;" and later upon page 677, "that the punishment is increased because by his persistence in the perpetration of crime he has **evinced a depravity** which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence."

Moore *v.* Missouri, 159 U. S., 675.

The object in quoting this Moore case is to show that this Court has held that it is proper to take a

past conviction into account in order to determine the **present merit** of the convict for heavier punishment.

There appears to be a complete analogy between that power and the power of the State to take a past conviction into account as determining **present fitness** for a given profession.

In that regard this Moore case seems to be in complete harmony with the cases of

Murphy *v.* Ramsey, 114 U. S., 15.
Washington *v.* State, 75 Ala., 582.
Foster *v.* Police Commissioners, 102 Cal., 483.
United States *v.* Chew Cheong, 61 Fed. Rep., 200,

which we have cited in the main brief upon the proposition that **past conviction** may be taken into account as determining **present fitness.**

In the high ground which was taken by the Judges in the Cummings case, it was stated–

> "That the Constitution deals with substance, " not shadows. Its inhibition was levelled at " the thing, not the name." (P. 325.)

It is precisely that doctrine for which we are contending now. We conceive that the decision in the Cummings case was absolutely just and fair. We see no reason for any conflict between that case and this. **The underlying motives are wholly different.**

In our judgment the claim of Hawker, that he is protected under the doctrine of the Cummings case seems unwarrantable.

The people of the State of New York respectfully protest against any such unwarrantable extension of the doctrine of the Cummings case, as opening the door to grave error.

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Manifestly, as this Court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."

Pollock *v.* F. L. & T. Co., 157 U. S., 429, at page 576, per Mr. Chief Justice Fuller.

POINT VIII.

The possible consequences of reversal.

It has been over and again held that the possible consequences of a construction are most material to be taken into account.

If this judgment were reversed, it would seem that the door would be opened to consequences almost intolerable.

In the first place, the distinction between proper regulation and punishment would be destroyed and great confusion would result. The logical consequence of such a decision would be to render a State incompetent to take into account a prior conviction in order to determine present fitness; for it could then be fairly claimed in every case, that additional punishment was imposed. Such an interpretation of the *ex post facto* clause, would lead to the proposition that the States had yielded up their right to take into consideration the very circumstance which would weigh most heavily with a business man in the conduct of his own concerns, namely, present fitness as affected by previous conviction of felony.

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We have seen under Stone *vs.* Mississippi, 101 U. S., 814, as recently commented upon in Douglass *vs.* Kentucky, 168 U. S., 488, that the very essence of the police power is its capacity to "vary with varying circumstances."

A superficial glance at the condition of this country will show that in the matter of the regulation of the practice of medicine, legislation must change with the times.

It is obvious that in a sparsely settled country, where the inhabitants have opportunities of becoming acquainted with one another, little or no danger could follow from the practice of medicine by a felon.

Indeed, the smallness of the population might cause greater inconveniences if he were excluded from practice. Upon the other hand, if the population is increased, and, particularly, if large cities spring up, to which the baser element of the population is attracted, conditions might be entirely altered. Individuals are thereby compelled to trust more and more to the good faith of each other; their opportunities for investigation become less; and just to this extent the necessity for guarantees becomes greater.

Applying this to medical legislation, it has been the invariable rule of the States to make the regulation more comprehensive, just in proportion as the population increases, and as society becomes more complexly organized. The wisdom and good faith of such modifications are abundantly apparent.

Now, when in the process of improvement, the State had elected to exclude those who were educationally deficient, as it could do under the authority of the Dent case, 129 U. S., 114; it might well later find it wise to exclude those who were deficient in good moral character; yet the plaintiff in error, Hawker, would claim that by the wording of the *ex post facto* law the State would run up against a stone wall; and would be lacking in power to exclude

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those who were most unfit; those who had been solemnly adjudicated to be unfit.

It seems absurd to claim that the States, at the adoption of the Constitution, ever intended to surrender such a power.

From another point of view, we know that although this country is divided up into separate States, it is substantially a single country, and that people pass from State to State without let or hinderance. It is also a well known fact that the chief crimes connected with the medical profession are perpetrated in large cities, and that it is to large cities that individuals resort when it is their desire to submit to medical treatment for vicious purposes.

Assuming then that the retrospective feature of the New York law under consideration were unconstitutional, it would follow that as soon as a man was convicted of a felony in New York City, and thereby precluded from practice, he could move to Philadelphia or Boston, or for that matter across the Hudson River to Jersey City, and continue his practice without let or hinderance; for by the artificial construction of the *ex post facto* clause contended for by the plaintiff in error, Hawker, the State to which the fugitive had gone would have no right to pass a statute excluding him from practice, which would apply to his case if he had been convicted before the statute was passed.

This seems to be a complete *reductio ad absurdum*. The history of the medical legislation in all the States shows plainly that it is altered from time to time, and made more and more comprehensive, just in proportion as the needs of the community justify it.

If a State suffered an incursion of felons before it had passed a Medical Law, it would for that reason be more grievously in need of such a law.

Thus, in the case assumed, what would be a valid test of fitness in New York, from which the con-

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vict had come, would be no test in New Jersey to which he had gone.

This seems to be a complete *reductio ad absurdum.*

Counsel knows from his experience with the cases of the New York County Medical Society, that very result of these medical laws is to drive violators from state to state.

Again, it is well known and frequently happens, that in the course of codifying laws, statutes are often repealed. In New York State, for example, as we have seen in the main brief, by Chapter 275, of the Laws of 1844, all medical regulations were abolished, and a new system had to be built up.

Assume then that at this date there were ex-convicts whose conviction had postdated the present medical law of New York, and who by it were plainly excluded from practice.

Assume then that the Medical Law was repealed and that practice by ex-convicts was no longer prohibited. Assume that afterwards, the same Medical Law was re-enacted, again prohibiting practice by ex-convicts. Could the ex-convict assail the subsequent law as imposing additional punishment, and yet recognize that the previous similar law possessed no such vice?

It is submitted that such a view, in the language of Mr. Justice Peckham, 145 N. Y., 44, would **mistake the foundation upon which the police regulations rest.**

It is believed that these considerations, and many others which they suggest to thoughtful minds, will show that the claim made by the plaintiff in error, Hawker, is altogether unsustainable.

In this point we have referred solely to the practice of medicine; but it is possible that conviction of felony might be made a disqualification along other lines, and no complaint could be made if such disqualification was created.

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Precisely the same arguments would be applicable and precisely the same intolerable burden upon the sovereignty of the States could be claimed, if this judgment were reversed.

POINT IX.

The proper point of view for the resolution of the question before the Court.

Is it conceivable, that when the States adopted the Constitution, they could ever have intended to make their power to consider personal fitness to depend upon such narrow and rigid interpretation as is now advanced?

It goes without saying that any ruling which would place such arbitrary limitations upon the police power of the States would be a most decided negation of their sovereignty.

The maintenance of this sovereignty is one of the solemn duties of this Court, and is within the design and care of the Constitution.

> "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the **design and care** of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to **an indestructible Union, composed of indestructible States.**"
>
> Texas *v.* White, 7 Wall., 700, per Chase, *C. J.*, at page 725.

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Any other manner of construction would soon negative the possibility of "indestructible States."

We are taught by this Court ever to bear in mind that the question involved in this case must be resolved as of the very moment of the adoption of the Constitution.

> "We are too apt, in estimating a law passed at a remote period, to combine in our consideration all the subsequent events which have had an influence upon it, instead of confining ourselves, which we ought to do, to the **existing circumstances,** at the time of its passing."
>
> Ware *v.* Hylton, 3 Dall., 199, per Paterson, *J.*, at page 267.

In the light of the recent decision of this Court in Mattox *v.* United States, 156 U. S., 237, the Court would be almost justified in creating an exception to the *ex post facto* clause of the Constitution, if thereby alone the unfitness of an ex-convict could be taken into account.

In that case the question of the meaning of the words that the accused should be "confronted with the witnesses against him," was held not to create new rights so as to render it impossible to use the testimony of a witness who had been examined upon a former trial, but had since died.

Per Mr. Justice Brown:

> "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill

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> of Rights are **subject to exceptions,** recognized long before the adoption of the Constitution and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and **farther than the safety of the public will warrant.**"
>
> Mattox *v.* United States, 156 U. S., 237, at p. 243.

In this case, however, we do not ask that any exception to the strict words of the Constitution should be raised. We simply ask that the distinction between punishment and disqualification for cause should be recognized; and that the State of New York should not be held to have punished a man when it never had any intention so to do.

We ask not that the doctrine of the police power shall be unduly extended, nor that the clause of the Constitution touching *ex post facto* laws should be in the slightest degree limited, but that the complete harmony of these two forces shall be vindicated.

Conclusion.

The briefs of counsel in this matter have extended to greater length than was at first intended. Counsel trusts, however, that no apology for this length is needed. The question before the Court is one of profound importance. The Court itself, of its own motion, has ordered a re-argument; and it has been thought that the Court would welcome any information which bore upon the subject, either directly or by analogy.

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No. 415.

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415

In the Supreme Court of the United States.

BENJAMIN W. HAWKER,
Plaintiff in Error,

AGAINST

THE STATE OF NEW YORK,
Defendant in Error.

Skeleton Analysis.

Good moral character is a **proper qualification** to require of a physician.

(a) By New York Statutes (Main Brief, pp. 14–17).

(b) By other statutes (Main Brief, pp. 18–25).

(c) By adjudications (Main Brief, pp. 25–28).

Conviction of felony proves bad moral character.

Main Brief, pp. 29–31.

The Legislature has the right to fix an arbitrary standard.

Main Brief, pp. 33, 34, where see particularly Jones vs. Brim, 165 U. S., 180.

Physician's status is that of **a licensee.**

Main Brief, pp. 35–38, where see particularly Ohio vs. Gazely, 5 Ohio, 14, and Dent. vs. W. Va., at pp. 10, 11.

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Licensee is amenable to the imposition of **further conditions.**

See generally Main Brief, pp. 39-50, and see particularly the following cases in the Main Brief: Dent vs. W. Va. at p. 10; Gray vs. Conn. at p. 40; Percy's case at p. 41; Health Dept. vs. Rector at p. 44, and Douglass vs. Kentucky at p. 48.

Hawker cannot claim that by granting him a license to practice medicine the State bargained away its power to make future general regulations which might control his right to practice.

See generally Main Brief, pp. 39–50, and see particularly Gray vs. Conn., pp. 40, 41, and Douglass vs. Kentucky, p. 48–49.

The legitimate incidence of the police power produces **no deprivation of property** within the constitutional inhibition.

See, generally, Main Brief, pp. 39–50.

Before the adoption of the Constitution the States had unlimited power.

Suppl. Brief, pp. 3 and 4.

In adopting the Constitution they did not intend to surrender any control over internal police.

See, generally, Suppl. Brief, at pp. 12-16, and particularly the quotation from the Federalist, at pp. 15, 16.

Calder vs. Bull, 3 Dall., 389, shows **what mischiefs** the *ex post facto* clause was designed to prevent.

Suppl. Brief, pp. 7–10.

It shows that the *ex post facto* clause was not designed to deprive the States of their internal police power; and that, in declaring a law void as *ex post facto*, the Court **should not go further than it was bound to go.**

Suppl. Brief, at p. 10, and also p. 11.

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There is nothing *ex post facto* in a regulation which allows a **past conviction** to be taken into account in determining **present fitness.**

"It does not seek * * * to operate as a punishment upon any offense at all. This disfranchisement operates upon the **existing** state and condition of the person, and **not upon a past offense."**

Main Brief, p. 52, quoting Murphy vs. Ramsay, 114 U. S., 15, and three other cases.

Mere exclusion from a profession for conviction of felony is **not a punishment** at all, but a protection of the public.

Main Brief, pp. 31-2, citing *Ex parte* Wall, 107 U. S., 265, referring to an attorney.

In the **Cummings** and **Garland** cases, "the question is not as to the existence of the police power, but whether that power has been made an instrument for the infliction of **punishment."**

Main Brief, at p. 7.

In those cases "the circumstances attending and the causes of the deprivation" showed the design to punish.

Suppl. Brief, at p. 22.

Here the statute is purely a general regulation touching the public health.

Main Brief, p. 61.

The question of the legislative **intent** is decisive.

Suppl. Brief, pp. 23-4.

In case of doubt the question of intent must be resolved in favor of the law.

Main Brief, pp. 60 and 61.

The State has the right to **exclude an existing practitioner** of medicine for not possessing new **educational requirements**—the **Dent** case.

Main Brief, pp. 10, 11.

In this case the State of New York only imposes a new **character requirement.**

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The question involved in this case seems quite analogous to the question involved in the Dartmouth College case, and counsel has approached the subject with a sense of extreme responsibility; and under the impression that the opinion which the Court will be called upon to write will be of far reaching importance and effect.

In closing it is best to re-state the precise proposition contended for by the State of New York:

The reserved police power of the States could never have been intended to be so limited by the ex post facto clause, as that the States would be precluded from taking into account a past conviction as evidence of present unfitness.

The judgment of the Court of Appeals of the State of New York should be affirmed.

ASA BIRD GARDINER,
District Attorney.

ROBERT C. TAYLOR,
Counsel of the Medical Society of the County of New York, of Counsel.

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HAWKER *v.* NEW YORK.

ERROR TO THE COURT OF GENERAL SESSIONS OF THE PEACE FOR THE CITY AND COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 415. Argued March 9, 1898. — Decided April 18, 1898.

The provision in the act of the legislature of New York of May 9, 1893, c. 661, relating to the public health, as amended by the act of April 25, 1895, c. 398, that "any person who, . . . after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars, or imprisonment for six months for the first offence, and on conviction of any subsequent offence, by a fine of not more than five hundred dollars, or imprisonment for not less than one year, or by both fine and imprisonment," does not conflict with Article I, section 10, of the Constitution of the United States which provides that "No State shall . . . pass any Bill of Attainder, *ex post facto* Law or law impairing the Obligation of Contracts," when applied to a person who had been convicted of a felony prior to its enactment.

In 1878 the plaintiff in error, defendant below, was tried and convicted in the Court of Sessions of Kings County, New York, of the crime of abortion, and sentenced to imprison-

ment in the penitentiary for the term of ten years. On May 9, 1893, the legislature of the State of New York passed an act entitled "The Public Health Law," Laws 1893, c. 661, which, as amended by the law of April 25, 1895, c. 398, provides, among other things, as follows:

"SECTION 153. Any person who, . . . after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars, or imprisonment for six months for the first offence, and on conviction of any subsequent offence, by a fine of not more than five hundred dollars, or imprisonment for not less than one year, or by both fine and imprisonment."

Under this statute defendant was indicted in April, 1896, in the Court of General Sessions of the Peace for the city and county of New York. The indictment alleged the conviction in 1878, and charged that, having been so convicted of the crime and felony of abortion, defendant did, on the 22d day of February, 1896, in the city of New York, unlawfully practise medicine "by then and there unlawfully examining, treating and prescribing for one Dora Hoenig." To this indictment he demurred. The demurrer was overruled, and, upon a plea of not guilty, he was tried, convicted and sentenced to pay a fine of $250. That conviction having been sustained by the Court of Appeals of the State, 152 New York, 234, and a remittitur sent down, a final judgment was entered in the Court of General Sessions, whereupon he sued out this writ of error.

Mr. Hugh O. Pentecost for plaintiff in error.

Mr. Robert C. Taylor and *Mr. Asa Bird Gardiner* for defendant in error. *Mr. W. M. K. Olcott* and *Mr. John D. Lindsay* were on the brief for the defendant in error.

MR. JUSTICE BREWER, after making the above statement, delivered the opinion of the court.

The single question presented is as to the constitutionality

of this statute when applied to one who had been convicted of a felony prior to its enactment. Its unconstitutionality is alleged on the ground of an alleged conflict with article I, section 10, of the Constitution of the United States, which forbids a State to pass "any Bill of Attainder, *ex post facto* Law or law impairing the Obligation of Contracts." The arguments for and against this contention may be thus briefly stated.

On the one hand it is said that defendant was tried, convicted and sentenced for a criminal offence. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practise medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and after the defendant has once fully atoned for his offence a statute imposing this additional penalty is one simply increasing the punishment for the offence, and is *ex post facto*.

On the other, it is insisted that within the acknowledged reach of the police power, a State may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practise medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character. In support of this latter argument counsel for the State, besides referring to the legislation of many States prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. In the footnote[1] will be found his collection.

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[1] COLORADO — The board may refuse certificates to persons convicted of conduct of a criminal nature; and may revoke certificates for like cause. Mills Ann. Stat. 1891, c. 101, § 3556.

IOWA — May revoke a certificate to a person who has been convicted of felony committed in the practice of his profession, or in connection there-

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We are of opinion that this argument is the more applicable and must control the answer to this question. No precise limits have been placed upon the police power of a State,

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with; or may revoke for like cause; . . . and such refusal or revocation prohibits such person from practising medicine, surgery or obstetrics. Laws 1889, c. 104, § 7.

LOUISIANA — The board is required to strike from the said list (of registered names) the names of persons convicted of any infamous crimes by any court . . . whether prior or posterior to registration. Act June 26, 1882, No. 31, § 5.

NEW JERSEY — May refuse or revoke a license for chronic and permanent inebriety, the practice of criminal abortion, conviction of a crime involving moral turpitude, or for publicly advertising special ability to treat or cure disease which, in the opinion of the board, it is impossible to cure (after hearing). Act May 12, 1890, c. 190, § 5.

NORTH DAKOTA — Substantially the same. Act January 10, 1890, c. 93, § 3.

VERMONT — May revoke or annul a certificate if in their judgment the holder has obtained it fraudulently or has forfeited his right to public confidence by the conviction of a crime. Rev. Laws 1880, c. 172, § 3915.

WASHINGTON — The board will refuse or revoke a license for unprofessional or dishonorable conduct, subject to the right of appeal. . . . "Unprofessional or dishonorable conduct" means procuring or aiding or abetting in a criminal abortion or employing what are popularly known as cappers or steerers; or obtaining any fee on the assurance that any manifestly incurable disease can be permanently cured; or wilfully betraying a professional secret; or advertisements of medical business in which untruthful or improbable statements are made; or advertising any medicine or means whereby the monthly periods of women can be regulated, or the menses reëstablished if suppressed; or the conviction of any offence involving moral turpitude; or habitual intemperance. Act March 28, 1890, §§ 3 and 4.

GREAT BRITAIN AND IRELAND — If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall be, after due inquiry, judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the register to erase the name of such medical practitioner from the register. Acts 21 and 22 Vict. c. 90, § 29.

NEW BRUNSWICK — Substantially same. Act 1881, c. 19, § 22.

NORTHWEST TERRITORY — Substantially same. Ord. 5, 1888, § 37, as substituted by Ord. 24, 1892, § 1.

NOVA SCOTIA — Substantially same. Rev. Stat. 5th ser. c. 24, § 19.

MANITOBA — Any registered medical practitioner convicted of felony or misdemeanor, before or after the passage of this act or his registration, forfeits his rights to registration, and by direction of the council his name

and yet it is clear that legislation which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power. Care for the public health is

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shall be erased. If a person known to have been convicted of felony or misdemeanor presents himself for registration, the register may refuse registration. If any person registered be judged after due inquiry . . . to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the register to erase his name. Rev. Stat. of Manitoba, 1891, c. 98, § 40.

BRITISH COLUMBIA — Any registered practitioner convicted of any felony thereby forfeits his right to registration, and . . . his name is required to be erased from the register; or, in case a person known to be convicted of felony presents himself for registration, the register has the power to refuse such registration. Cons. Act, 1888, c. 81, § 32; substantially same as to Quebec; Rev. Stat. 1888, § 3996.

ONTARIO — A practitioner is liable to have his name erased from the register where he has been convicted, before or after registration, of an offence which, if committed in Canada, would be a felony or misdemeanor, or where he has been guilty of any infamous or disgraceful conduct in a professional respect. Rev. Stat. 1887, c. 148, § 34.

NEWFOUNDLAND — The . . . board may try and expel any member of the profession for acts of malpractice, misconduct or immoral habits. . . . Act, 1893, c. 12, § 32.

PRINCE EDWARD'S ISLAND — A medical practitioner guilty of infamous or disgraceful conduct in a professional respect is liable to have his name erased, and, if he apply for registration, the council may refuse it. Act 1892, c. 42, § 22.

NEW ZEALAND — If any registered person shall be or shall have been convicted of any felony or misdemeanor in Great Britain or Ireland, or in any of the British Dominions, the register general and register, respectively, shall erase the name of any such person from the register, and such erasure shall be notified by the register general in the New Zealand Gazette. Medical Practitioners Act, 1869, No. 51.

HAWAII — It shall not be lawful for any person to practise in this kingdom as a physician or surgeon for compensation or reward unless he shall have first presented to the board of health satisfactory evidence of his professional qualifications and good moral character. Act 1876, c. 11, § 3.

ST. LUCIA — If any registered medical practitioner is convicted of any felony, the register shall erase the name of such practitioner from the Medical Register. If any registered medical practitioner is convicted of any misdemeanor, a report shall be submitted . . . to the governor in council, who . . . shall determine whether (he) has been guilty of infamous conduct in any professional or other respect, and may thereupon, if he sees fit, direct the register to erase the name. . . . Medical Practitioner Ordinance No. 77 of 1885, § 11.

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something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent* v. *West Virginia*, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."

We note also these further declarations from state courts: In *State* v. *State Medical Examining Board*, 32 Minnesota, 324, 327, it was said: "But the legislature has surely the same power to require, as a condition of the right to practise this profession, that the practitioner shall be possessed of the qualification of honor and good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be entrusted with the discharge of its duties." In *Thompson* v. *Hazen*, 25 Maine, 104, 108: "Its authors were careful, that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. . . . It could not have been intended that persons destitute of the moral qualifications required should have full opportunity to enter professionally the families of the worthy but unsuspecting, be admitted to the secrets which the sick chamber must often entrust to them." In *State* v. *Hathaway*, 115 Missouri,

36, 47: "The legislature, then, in the interest of society and to prevent the imposition of quacks, adventurers and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the State permits to practise medicine. . . . And the objection now made that because this law vests in this board the power to examine not only into the literary and technical acquirements of the applicant, but also into his moral character, it is a grant of judicial power, is without force." In *Eastman* v. *State*, 109 Indiana, 278, 279: "It is, no one can doubt, of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled and learned men." In *State* v. *Call*, (North Carolina,) 28 S. E. Rep. 517: "To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privileges. The door stands open to all who possess the requisite age and good character, and can stand the examination which is exacted of all applicants alike."

But if a State may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. *County Seat of Linn County*, 15 Kansas, 500, 528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity." *Dent* v. *West Virginia*, *supra*, p. 122.

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It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule — one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offences is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practise medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the State, leaving the question of violation to be determined according

to the ordinary rules of evidence, would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law one convicted of crime was incompetent as a witness, and this rule was in no manner affected by the lapse of time since the commission of the offence and could not be set aside by proof of a complete reformation. So in many States a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. *Washington* v. *State*, 75 Alabama, 582. In *Foster* v. *Police Commissioners*, 102 California, 483, 492, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before." In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. "It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given

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state of facts, and the creation by law of such presumptions is after all but an illustration of the power to classify." *Jones* v. *Brim*, 165 U. S. 180, 183.

Defendant relies largely on *Cummings* v. *The State of Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333. In the first of these cases a test oath, containing some thirty distinct affirmations respecting past conduct, extending even to words, desires and sympathies, was prescribed by the State of Missouri upon all pursuing certain professions or avocations; and in the second a similar oath, though not so far reaching in its terms, was required by act of Congress of those who sought to appear as attorneys and counsellors in the courts of the United States. It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counsellor, the oaths should be considered not legitimate tests of qualification, but in the nature of penalties for past offences. These cases were called to our attention in *Dent* v. *West Virginia*, *supra*, in which the validity of a statute of West Virginia imposing new qualifications upon one already engaged in the practice of medicine was presented for consideration. After pointing out the distinguishing features of those cases, this court summed up the matter in these words, p. 128:

"There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practise the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right

to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State."

Ex parte Wall, 107 U. S. 265, is also worthy of notice. In that case the Circuit Court had stricken the petitioner's name from the roll of practising attorneys, on the ground that he had committed a crime, although not in the presence of the court, nor interfering with it in the discharge of its duties. The petitioner here insisted that the act which was charged against him was one for which he was, if guilty, liable to trial and conviction under the law of the State, and that the Federal court had no power on account of such act, one having no connection with his obligations to that court, to disbar him. In reply to this contention it was said, p. 273:

"It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll, as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession. . . . Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man

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whom they have formerly admitted is a proper person to be continued on the roll or not.'"

The thought which runs through these cases, and others of similar import which might be cited, is that such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be and what is in fact appropriate evidence of such qualifications.

In *Gray* v. *Connecticut*, 159 U. S. 74, 77, this court considered the effect of a statute prescribing additional qualifications for one acting as a pharmacist who already had a license from the State therefor, and said: "Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful." See also *Foster* v. *Police Commissioners*, *supra*, and *State* v. *State Board of Medical Examiners*, 34 Minnesota, 387.

We find no error in the record, and, therefore, the judgment of the state court is

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Peckham and Mr. Justice McKenna, dissenting.

By an indictment in the Court of Sessions of Kings County, New York, the present plaintiff in error was charged with the crime of abortion, committed September 1, 1877. He was found guilty and sentenced, March 6, 1878, to imprisonment in the penitentiary for the term of ten years.

Chapter 661 of the laws of New York of 1893, as amended by the laws of 1895, provides that "any person who, after conviction of a felony, shall attempt to practise medicine, or shall so practise, shall be guilty of a misdemeanor," etc.

The present indictment charged the plaintiff in error with the commission of the offence last stated, in that having been convicted in 1878 of the above crime of abortion committed

in 1877, he unlawfully, on the 22d day of February, 1896, in the city of New York — nearly twenty years after the commission of the crime of abortion — practised medicine by "then and there unlawfully medically examining, treating and prescribing for Dora Hoenig."

If the statute in force when the offence of abortion was committed had provided that, *in addition* to imprisonment in the penitentiary, the accused, if convicted, should not thereafter practise medicine, no one, I take it, would doubt that such prohibition was a part of the *punishment* prescribed for the offence. And yet it would seem to be the necessary result of the opinion of the court in the present case, that a statute passed after the commission of the offence in 1877 and which, by its own force, made it a crime for the defendant *to continue* in the practice of medicine, is not an addition to the punishment inflicted upon him in 1878. I cannot assent to this view. It is, I think, inconsistent with the provision of the Constitution of the United States declaring that no State shall pass an *ex post facto* law.

The scope and meaning of the *ex post facto* clause of the Constitution was determined in *Calder* v. *Bull*, 3 Dall. 386, the opinion being delivered by Mr. Justice Chase. The classification there made of cases embraced by that provision has been universally accepted in the courts of this country, although this court said in *Kring* v. *Missouri*, 107 U. S. 221, 228, that it was not to be supposed that the opinion in *Calder* v. *Bull* undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable. That classification was as follows: "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime and makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offence in order to convict the offender."

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In *United States* v. *Hall*, 2 Wash. C. C. 366, Mr. Justice Washington said "that an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which *increases the punishment*, or, in short, which in relation to the offence, *or its consequences*, *alters* the situation of a party *to his disadvantage*." And so it was held in *Kring* v. *Missouri*, 107 U. S. 221, 228, and in *Medley, Petitioner*, 134 U. S. 160, 171.

If, long after the commission of a crime, and long after the offender has suffered all the punishment prescribed at the time for its commission, a statute should, by its own force, and *solely because of his conviction of that offence*, take from him the right to further pursue his profession, would not such a statute inflict upon him a greater punishment than was annexed to the crime when committed, and alter the situation to his disadvantage, "in relation to the offence or its consequences"? In my opinion, this question should receive an affirmative answer.

It was said in argument that the judgment below was sustained by *Dent* v. *West Virginia*, 129 U. S. 114. That case presented no question under the *ex post facto* clause of the Constitution. It only involved the question whether any one could, of right, pursue the practice of medicine without obtaining a license to do so, if the State required a license as a condition of exercising the privilege of pursuing that profession. This court held that such a statute was within the reserved police power of the State, and consistent with the due process of law enjoined by the Fourteenth Amendment. It said: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure, or tend to secure, them against the consequences of ignorance and incapacity, as well as of deception and fraud." It was not the case of a state enactment which, by its own force, made it a crime for any person, *lawfully engaged*, *when such act was passed*, in the practice of the medical profession, to continue to do so, if he had *at any time* in his past life committed a felony, although he may have suffered all the punishment prescribed for such felony when it

was committed. If the statute of West Virginia had been of that character, the same question would have been presented that arises under the statute of New York.

In *Cummings* v. *Missouri*, 4 Wall. 277, 321, this court said: "The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined." The court now holds that a legislative enactment does not inflict punishment for past conduct when it makes it a crime for any one lawfully engaged in the practice of medicine — as was the plaintiff in error — to continue in the pursuit of his chosen profession, if at any time in the past, and although a half century may have intervened, he was convicted of a felony of any character, notwithstanding he suffered the entire punishment prescribed for such felony when committed.

In *Ex parte Garland*, 4 Wall. 333, 377, which involved the validity of an act of Congress requiring, among other things, a certain oath to be taken as a condition of the right of one to appear and be heard as an attorney at law by virtue of any previous admission to the bar, this court, referring to certain clauses of the act relating to past conduct, said: "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary vocations of life for past conduct can be regarded in no other light than as punishment for past conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enact-

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ments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts *it adds a new punishment* to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law."

The statute in question, it is to be observed, takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practise medicine. The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow-men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree embodied in a statute which, without hearing, and without any investigation as to the character or capacity of the person involved, takes away from him absolutely a right which was being lawfully exercised when that decree was passed. If the defendant had been pardoned of the offence committed by him in 1877, he would still, under the statute of 1895, have become a criminal if he continued in the practice of his profession.

It will not do to say that the New York statute does nothing more than prescribe the qualifications which, after its passage, must be possessed by those who practise medicine. Upon this point, Mr. Justice Patterson of the Supreme Court of New York well said: "Assuming, for the purpose of the argument, that the legislature may require for the continuance in the practice of medicine that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such requirement must relate to a present status or condition of a person coming within the terms of the act. The law under which this appellant was indicted does not deal with his present moral character. It seizes upon a

past offence, and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. It will be observed that this statute includes any and all felonies — not only those committed in connection with the profession of medicine and surgery, but any and every felony in the whole catalogue of crime, whether committed here or in another jurisdiction. Its design is to deprive convicted felons of the right of practising at all. Clearly it acts directly upon and enhances the punishment of the antecedently committed offence by depriving the person of his property and right and preventing his earning his livelihood in his profession, only because of his past, and in this case expiated, offence against the criminal law. The prisoner has committed no new crime except that which the statute has created out of the old. He had absolutely the right to practise medicine the day before that statute was passed. His former conviction entailed the punishment of imprisonment and disfranchisement as a voter, but it did not take away his property in the right to earn his living on the expiration of his imprisonment, by engaging in the profession of which he was and is a member. His civil rights were not extinguished, but only suspended, during his imprisonment. 2 Rev. Stat. 701, § 19; Penal Code, § 710."

I concur entirely in these views, and must withhold my assent to the opinion of the majority.

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